SUPREME COURT, U. S.

FILED
JUN 8 1968
JOHN F. DAVIS, CLERK

No. 173

In the
Supreme Court of the United States
OCTOBER TERM, 1968

RICHARD E. GORMAN,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
53 West Jackson Boulevard
Chicago, Illinois 60604
Attorneys for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

PAGE

Judgment and Opinion of the Courts Below 1-2

Jurisdiction 2

Questions Presented 2-3

Statutes Involved 3-4

Statement of the Case 4-5

Statement of Facts 6-15

Reasons for Granting Writ 16-36

Conclusion 36

Appendix:

Opinion of the United States Court of Appeals ..1a-8a

Order Affirming 9a

Order Denying Petition for Rehearing En Banc .. 10a

Order Denying Petition for Rehearing 11a

Authorities Cited

Cases

Anderson v. United States, 9 Cir., 237 F. 2d 118 18

Bryan v. United States, 5 Cir., 373 F. 2d 403 16

Carter v. United States, 5 Cir., 325 F. 2d 697 .....16, 18

Coffman v. United States, 10 Cir., 290 F .2d 219 19

Davis v. United States, 160 U.S. 469 18

Durham v. United States, C.A.D.C., 214 F. 2d 862 ....
.....17, 18, 31

Hall v. United States, 4 Cir., 295 F. 2d 26 .....24, 27

Howard v. United States, 5 Cir., 232 F. 2d 274 ..18, 27-28

Jones v. United States, C.A.D.C., 284 F. 2d 245 31

PAGE

Levine v. United States, C.A.D.C., 261 F. 2d 747 16

New York C & H RR. Co. v. United States, 2 Cir., 166 F. 267 33

Pope v. United States, 8 Cir., 372 F. 2d 710 .....18, 29-30

Power v. United States, 6 Cir., 282 F. 2d 450 18

Rumely v. McCarthy, 250 U.S. 283 33

Salley v. United States, C.A.D.C., 353 F. 2d 897 16

Strauss v. United States, 5 Cir., 376 F. 2d 416 16

Tatum v. United States, C.A.D.C., 190 F. 2d 612 .....17, 22-24, 31

United States v. Anderson, 328 U.S. 699 33

United States v. Chandler, 4 Cir., 295 F. 2d 26 18

United States v. Currens, 3 Cir., 290 F. 2d 751 ....18, 29

United States v. Freeman, 2 Cir., 357 F. 2d 606 ....18, 29

United States v. Johnson, 322 U.S. 273 32

United States v. Lombardo, 241 U.S. 73 33

United States v. Malafronte, 2 Cir., 357 F. 2d 629 29

United States v. Shapiro, 7 Cir., 383 F. 2d 680 18

United States v. Westerhausen, 7 Cir., 283 F. 2d 844 .....17, 31

PAGE

CONSTITUTION AND STATUTES

Article 3, Section 2, Clause 3, Constitution of the United States 32

Sixth Amendment, Constitution of the United States .. 32

26 U.S.C. Section 6091 33

26 U.S.C. Section 7203 3-4

26 U.S.C. Section 7621 ..... 3, 4, 7, 34

26 U.S.C. Section 7851 35

28 U.S.C. Section 1254(1) 2

TEXTS

United States Code Congressional And Administrative News, 83rd Congress 2nd Session 34

American Bar Association Journal, June, 1968 20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No.

RICHARD E. GORMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, Richard E. Gorman, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW

The judgment of the United States District for the Northern District of Illinois, Eastern Division, in Case Number 66 CR 133 was entered on October 14, 1966, and is not reported, but appears in the record filed with and

certified by the Clerk of the Court of Appeals for the Seventh Circuit to this Court.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed April 5, 1968, and is not yet reported, but is set forth in the Appendix hereto and in the certified copy of the record as number 16018 as of that date.

JURISDICTION

The date of the judgment to be reviewed is April 5, 1968. A petition for rehearing en banc or in the alternative by the panel of judges hearing the matter in the Court of Appeals for the Seventh Circuit was denied May 9, 1968. This petition is filed within 30 days of that order. The jurisdiction of this court is invoked under 28, U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Should not a standard of mental capacity be defined for the guidance of United States Courts and litigants?

2. Was not the petitioner's right to a fair trial under the Sixth Amendment to the Constitution denied when the Court of Appeals held it was not reversible error for the trial court to refuse to charge the jury as requested on the petitioner's theory of defense, which was the lack of mental capacity to commit the crime charged?

3. When the trial court recognized and stated that "some considerable evidence" relating to the defendant's mental condition had been introduced, and yet refused defendant's properly submitted ALI insanity instruction, did not the Court of Appeals, to justify affirmance, err

in reassessing the quantum and quality of evidence of mental incapacity to commit the crime, in order to reach a finding *de novo* that the issue of insanity was not raised by "some evidence."

4. When the issue of mental incapacity to commit a crime was raised by the defense, was not the petitioner entitled to a directed verdict when the government presented no rebuttal, and no proof of mental capacity to commit the crimes charges beyond reasonable doubt?

5. Did not the Court of Appeals err in its opinion in holding that venue for this prosecution was properly laid and proved in the Northern District of Illinois, when neither the President of the United States nor his delegate, the Secretary of the Treasury has established any Internal Revenue Districts under Section 7621 of Title 26, U.S.C.?

6. Does the decision of the Court of Appeals fixing venue constitute legislation by judicial fiat?

STATUTES INVOLVED

Title 26, United States Code.

§7203. Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties

provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with costs of prosecution. Aug. 16 1954, c. 736, 68A Stat. 851.

26 U.S.C. §7621. Internal revenue districts.

(a) Establishment and alteration. The President shall establish convenient internal revenue districts for the purpose of administering the internal revenue laws. The president may from time to time alter such districts.

(b) Boundaries. For the purpose mentioned in subsection (a), the President may subdivide any State, Territory, or the District of Columbia, or may unite two or more States or Territories into one district.

STATEMENT OF THE CASE

This case involves a judgment of conviction on a five count indictment, charging in the first count that the defendant, a resident of the County of Cook, State of Illinois, had received a gross income of $43,629.12 during the calendar year 1959 and failed to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Chicago, at Chicago, Illinois, on or before April 15, 1960, and that the said failure to make such return was wilful, in violation of Section 7203, Internal Revenue Code, Section 7203, Title 26, United States Code.

Count II charged the defendant with the receipt of a gross income of $28,072.60, during the calendar year 1960 and with the wilful failure to make on or before April 15, 1961, a tax return as aforesaid.

Count III charged the defendant with having received a gross income of $20,753.57 during the calendar year

1961 and with having wilfully failed to make an income tax return before April 15, 1962, as aforesaid.

Count IV charged the defendant with having received a gross income of $11,775,00 during the calendar year of 1962, during the calendar year 1962 and with having wilfully failed to make an income tax return on or before April 15, 1963, as aforesaid.

Count V charged the defendant with having received a gross income of $38,940.00 during the calendar year 1963 and with having wilfully failed to make an income tax return on or before April 15, 1964, as aforesaid.

The case was tried to the court, sitting with a jury beginning September 19, 1966, through September 27, 1966, upon which date a verdict of guilty as charged was returned as to all counts. Judgment on the verdict was entered on October 14, 1966, and the defendant was sentenced to the custody of the Attorney General for a period of one year on each of Counts I, II, and III, sentences to run concurrently as to each of the said counts and to the custody of the Attorney General for a period of one year on Count IV to run consecutive to the sentences on Counts I, II, and III, and to the custody of the Attorney General for a period of one year on Count V, to run consecutive to the sentence on Count IV, or a total of three (3) years.

In the appeal to which certiorari is sought, your petitioner complained of errors arising out of erroneous rulings by the trial court which deprived him of his constitutional right to defend himself; in the court's instructions and refusal to instruct the jury, as to his theory of the case particularly concerning his mental capacity to commit the crime and the government's failure to meet its burden of proof on the question of (a) mental capacity to commit the crime, and (b) venue.

STATEMENT OF FACTS

Opening statements were made by counsel for the government and for the petitioner, (A. 11) outlining the theory of the case of the respective parties. In this statement of facts concerning the evidence, all differences, on which reasonable minds apparently could disagree have been deleted. What is stated here is what the petitioner believes adequately covers the matters pertinent to this petition for Certiorari.

THE EVIDENCE RE VENUE

A. FOR THE GOVERNMENT.

Personnel of the Internal Revenue Service testified that a search of the records maintained in Chicago, Illinois, had been made seeking tax returns submitted by the petitioner for the years 1959 through 1963, and that none were found. (A. 14-17)

During cross-examination one of these witnesses Rose Chowaneck testified (A. 17) that a person who lives in Chicago or in a suburb must file their returns in the Chicago District, and that the basis for this answer is an instruction in the supplement to the Internal Revenue Manual which is a large book and is available only to persons working for the Internal Revenue Service.

An employee in the Regional Counsel's Office of the Internal Revenue Service testified (A. 18) to computations that he made of the petitioner's gross income for the years 1959 through 1963.

On cross-examination (A. 30, 31) this witness testified that when a person lives in the Chicago area or in the County of Cook, or works in Cook County his income tax returns are to be filed with the District Director of the

Chicago District. He stated that the legal source of that statement as to when the returns were to be filed was *in his opinion* contained in the Code and Regulations of the Internal Revenue Service, but no specific answer was forthcoming.

FOR THE DEFENSE.

The petitioner testified and and admitted not filing his tax returns for the years in question, and that during those years he resided in Oak Park, Illinois, a suburb of Chicago and maintained his law practice in downtown Chicago.

Both at the conclusion of the Government's case and at the close of all evidence, as well as after verdict, your petitioner moved for judgment of acquittal for, *inter alia,* failure to prove venue on the ground that no internal revenue districts have been established pursuant to the direction by the Congress to the Executive as contained in Section 7621 of the Internal Revenue Code of 1954.

That the failure to establish venue was well recognized as a major issue in the lawsuit is clear. In the colloquy on instructions, it was again enunciated:

> "Mr. Calihan, (defense counsel): The only objection that I would have to that one is that it does not state the requirement of venue in the sense—this is part of our defense here, that there is no district established.
>
> "Mr. Schultz (Assistant United States Attorney): Your objection, as I understand it, is to a question of law now as to whether or not districts have been formed, and this is a question for the jury." (Tr. 903)

On Appeal, the Seventh Circuit held:

> "Section 6091 of the Internal Revenue Code of 1954 (26 U.S.C. § 6091) requires individuals to file

their income tax returns in the internal revenue district of their legal residence or place of business. Defendant contends that there is no venue on the ground that neither the President nor his delegate, the Secretary of the Treasury, has established any internal revenue districts under Section 7621 of said Code (26 U.S.C. § 7621), which provides:

> § 7621. Internal revenue districts.
>
> '(a) Establishment and alteration.—The President shall establish convenient internal revenue districts for the purpose of administering the internal revenue laws. The President may from time to time alter such districts.
>
> '(b) Boundaries.—For the purpose mentioned in subsection (a), The President may subdivide any State, Territory, or the District of Columbia, or may unite into one district two or more States or a Territory and one or more States.'

"This contention ignores Section 7851 (b) (2) of the Code (26 U.S.C. § 7851 (b) (2)), which provides:

> '§ 7851. Applicability of Revenue Laws.
>
> • • •
>
> '(b) Effect of Repeal of Internal Revenue Code of 1939.—
>
> '(2) Existing offices.—The repeal of any provision of the Internal Revenue Code of 1939 shall not abolish, terminate, or otherwise change—
>
> '(A) *any internal revenue district.*' (Emphasis supplied.)

"In 1946 the Secretary of the Treasury divided Illinois into two collection districts, with Cook County, in which Chicago and Oak Park are situated, in the First District (11 F.R. 177A, p. 28). Except for changes in nomenclature, Illinois has subsequently retained the same two collection

districts. Inasmuch as Chicago and Oak Park are in the First Collection District (now entitled "District Director, Internal Revenue Service, Chicago, Illinois"), venue was properly laid in the Northern District of Illinois. To hold otherwise would mean that no one could be prosecuted for failure to file tax returns anywhere in the United States. Congress intended no such ludicrous result." (Op. 16018, A. 7a-8a)

THE EVIDENCE RE MENTAL CAPACITY

A. FOR THE GOVERNMENT.

This evidence was adduced on the government's case-in-chief. There was no evidence in rebuttal.

The records of the Internal Revenue Service showed petitioner had filed his income tax returns through the taxable year 1958.

An agent of the Internal Revenue Service assigned to the Intelligence Division at Chicago, testified that, in a conference had on October 15, 1965, in the presence of his group supervisor, your petitioner appeared with an attorney (A. 35) and that it was represented to the Internal Revenue Service that your petitioner had been accused of subornation of a juror in a federal district trial in which he had participated in mid-1959 and in the summer of 1960 he had been indicted on that charge, and that the case went to trial in December of 1962 and your petitioner was found not guilty. It was also stated that as a result of the investigation and subsequent indictment for subornation of a juror, your petitioner had been incapable because of mental stress to handle his affairs and responsibilities. He further testified that your petitioner stated at that conference that he did not know

during this period if he realized any of his responsibilities and that he had been admitted to the Sacred Heart Sanitarium in Milwaukee and had availed himself of the services of a leading psychiatrist in Chicago.

B. FOR THE DEFENSE.

Your petitioner, an attorney, testified in his own behalf (A. 40). Your Petitioner testified that prior to the summer of 1959 he had been a regular taxpayer. That it came to his attention during that summer that one Gerald Covelli, was giving statements to the Department of Justice accusing your petitioner of having participated in subornation of a juror in a case that the petitioner had represented him as an attorney. Your petitioner testified concerning discussing the matter with personnel of the United States Attorney's office in Chicago and appearing before the Grand Jury investigating the matter on at least two occasions at his own request in an effort to forestall an indictment. Your petitioner testified that in June 1960 he was indicted and that this indictment pended until December of 1962, when after trial he was acquitted. Your petitioner testified further, among other things, concerning the effect of this indictment on him personally and to his practice and stated that he was greatly distressed because the prosecution had seen fit to indict him on the word of a man whom they knew to have no regard for the truth. He further testified concerning seeking psychiatric help and to the deterioration of his physical condition during this period of time. Because of the length of this testimony and its importance relative to this petition, and since it is completely set forth in the appendix, the petitioner respectfully requests that the court read it in its entirety.

A personal physician (A. 82) testified that during this period of time your petitioner developed a serious hyper-

tension which could be caused by an emotional and anxiety state. He gave a complete résumé of the petitioner's physical deterioration which resulted in his being admitted to the hospital in April of 1964 as critically ill. (A. 84)

Four attorneys (A. 95, 96, 97, 98) testified as character witnesses for the petitioner and also described their observations of him prior to and during the period 1959 through 1963, and to the marked changes in him during this period relative to appearance, demeanor, and habits, and an apparent diminution in legal acumen and awareness.

Your petitioner's wife testified to his history prior to the return of the indictment against him for subornation of a juror, as a husband, father, and son. She testified to her efforts to have him seek out and avail himself of medical treatment and psychiatric help during the pertinent period. (A. 108-111)

A qualified psychiatrist, (App. 114) testified that the petitioner had a classifiable, recognized, psychiatric illness, including the basic elements for a diagnosis for a psychoneurotic reaction, depressive type; that the symptoms were confusion and helplessness and an attitude that life was useless and that "nothing counts" to the point of disassociation with moral standards and moral codes; that among the responses normal to his condition as diagnosed are depression, psychosomatic problems, particularly a frequent occurrence of high blood pressure or hypertension; that there was temporary brain damage in the defendant caused by hypertension and the brain damage provoked emotional instability and a moral deterioration; that this condition prevents the man from carrying forth the norms, customs, obligations, and re-

sponsibilities incumbent upon a citizen of the community. (A. 121-124)

As stated before, the Government presented no rebuttal.

The defense requested an instruction be given to the jury, which instruction was:

> "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

The instruction was refused, and so far as mental capacity is concerned, the trial court instructed as follows:

> "Now, you have heard some considerable evidence in this case introduced relating to the defendant's mental and physical condition. Such testimony was introduced or permitted in this trial solely for one purpose and one purpose only and that purpose is so that you may consider whether or not the defendant's mental and physical condition caused the defendant to inadvertently or negligently fail to make his income tax returns for the years 1959 through 1963."

In its opinion, the Seventh Circuit Court of Appeals ignored the evidence detailed above, and synopsized the incapacity defense merely as follows:

> "During the summer of 1959 defendant was accused of subornation of a juror in the January 1959 criminal trial of his client, Gerald Covelli. Your petitioner's defense in this action was that the resulting mental stress caused him to neglect filing the tax returns in question. His indictment for subornation of a juror occurred in June 1960. He was acquitted of that offense in December 1962.

"In response to a hypothetical question, psychiatrist Dr. Marvin Ziporyn testified that defendant had 'a psychoneurotic reaction, depressive type,' but that his ability to reason logically was unimpaired. Dr. Ziporyn also testified that such a psychoneurotic 'is aware of reality,' and that defendant 'knew right from wrong' and was not psychotic. He described Gorman's condition as 'not uncommon.'" (Op. 16018 A. 1a-2a)

The Court of Appeals also characterized the theory of defense as "lack of wilfulness, not insanity . . .", though the record clearly shows that throughout the trial the defense of mental instability was clearly and repeatedly adverted to. A few of these occasions are:

Opening Statement:

"He neglected the most basic elements of just self-preservation . . . he eventually had to seek help, seek help with his health; his family got him to seek psychiatric help; sent him to a sanitarium; . . . experiences like that just don't go away over night . . . This . . . is what the evidence will show happened to a man, a sensitive man, who is prosecuted wrongfully."

Government witness Kelly on direct:

"Mr. Irish said to Mr. Gorman that since he had filed income tax returns prior to 1959 that he knew his responsibility of filing these returns. Mr. Gorman replied that this was not necessarily the truth because at the time, the case against him was pending he did not know if he realized any responsibilities." (A. 37)

Defense counsel:

". . . [t]his happens to be a case involving state of mind." (A. 60)

"It so affected this man that it brought about a complete deterioration of him." (A. 64)

The defendant:

"I do not know if I knew at that time April 15, 1961, that my tax returns had to be filed. I don't know if I thought about it. I don't know whether I knew on April 15, 1962 that my 1961 return was due to be filed. To a great extent I was not aware of any of my responsibilities. * * * *

"'During the years 1959 through 1963, Mr. Gorman did you know right from wrong?

"'A. In many respects I don't believe that I did.'" (A. 69-70)

"I believe I was aware of my mental incompetence during this period. (A. 72)

"I was receiving the general psychiatric treatment that he was following at that time." (A. 78)

"I think I had a fairly extensive knowledge of federal income tax and income taxation law during the years 1959 through 1963. Having this fairly extensive knowledge I still neglected my obligation to file. I believe that my failure to file was due to my state of mind during that period of time." (A. 81)

The Psychiatrist witness:

"Q. Now, the question was, Doctor, whether you have an opinion as to whether there was any distinct psychiatric diagnostic entity present.

"A. Yes, I do.

"Q. What is that?

"A. There is present in this set of facts *the basic elements for a diagnosis of a psychoneurotic reaction, depressive type.*

"Q. Can you state the basis of your opinion?

"A. Yes. These facts as you have given them show a great number of circumstances. The particular pattern of behavior that you have outlined is a very classical form of what is known as a depressive equivalent and the personality pattern prior to the onset of the symptoms as you have described them are, again, classically suggestive of the type of personality

who becomes involved in a reactive depression." (A. 121)

"Individuals who are possessed of what is technically called a rigid super ego and who have concerned themselves greatly with this type of operation in order to gain love, when they are confronted with an environmental situation of this kind where they feel betrayed and rejected, where they feel that their values do not work become *confused and helpless,* and, typically, they go into this type of depressive reaction where a defense mechanism, which we call a reaction formation, sets in. They swing to the polar type of conduct: They take on the *attitude of life is useless,* nothing counts, *what is the point of adhering to all of these codes and moral standards that I* have thought important. They obviously do not work in this world. I have been wronged. I have been confused. I have been in error. Nothing is of importance any more. Nothing counts. In short, they give up.

"Now, this particular set of circumstances, there is an additional problem of a feedback situation.

"Among the *responses that the organism gives in a depression, there are psychosomatic problems, particularly a frequent occurrence of high blood pressure or hypertension,* as has been described in your question to me.

"Now, apparently this rose to extremely high limits; the figure of 260 over 120 is so serious that an impending fatality might be expected.

"A diagnosis was made, as I understand it, of hypertensive encephelopathy. This means in plain talk that *the brain was temporarily damaged by the hypertension, by the high blood pressure.*

"Now, a damaged brain, an organic brain syndrome, has certain characteristic findings. One of them is an *emotional instability.* This is a cardinal feature of an organic brain syndrome such as an intensive, a hypertensive encephelopathy." (A. 122-123) (Emphasis Ours)

REASONS FOR GRANTING THE WRIT

1. This case presents the important question of what constitutes mental incapacity at law. The question has been considered by all Circuits, and the Circuits are in a state of flux. This question has not been, but should be, ruled on by this Court as was so strongly urged by the Fifth Circuit in the dissenting opinions filed in *Carter* v. *United States,* 325 F. 2d 697.

2. This case presents an important question of Constitutional law, as here the Court of Appeals for the Seventh Circuit approved the refusal of the trial court to charge the jury on the petitioner's sole theory of defense. Such approval is unique (See *Salley* v. *United States,* C.A.D.C., 353 F. 2d 897; *Levine* v. *United States,* C.A.D.C., 261 F. 2d 747; *Strauss* v. *United States,* 5 Cir., 376 F. 2d 416), and constitutes a sanction of such a departure from the accepted and usual course of judicial proceedings as to call for this court's power of supervision.

3. In justifying the refusal of the requested charge, the Court of Appeals reassessed and reevaluated what the trial court had characterized as "some considerable evidence relating to the defendant's mental condition," and concluded *de novo* that the issue of mental incapacity had not been raised by "some evidence." The ultimate result of the reassessment was the approval of the removal of an issue from the trial and on that issue a deprivation of jury trial. In approving the withdrawal of an issue from the jury, the decision herein conflicts with the Fifth Circuit in *Strauss* v. *United States,* 376 F. 2d 416 and in *Bryan* v. *United States,* 373 F. 2d 403.

4. The issue of mental incapacity to commit the crimes charged, as raised by the defense, cast an affirmative burden upon the government of proof beyond a

reasonable doubt of the necessary mental capacity. To relieve the government of that burden strikes at the most basic concepts of criminal law and is in conflict with the decisions of the District of Columbia Circuit in *Tatum* v. *United States,* 190 F. 2d 612; in *Jones* v. *United States,* 284 F. 2d 245; and in *Durham* v. *United States,* 214 F. 2d 862; and even with the Seventh Circuit in *United States* v. *Westerhausen,* 283 F. 2d 844.

5. This case presents a vital question relating to venue in criminal cases involving failure to file returns and requires a determination of whether the Executive has omitted to comply with the direction of the Legislature that it establish Internal Revenue Collection Districts, and whether the Judiciary has exceeded its constitutional powers in fulfilling the omission by its decision.

I.

As noted hereinbefore the defense requested the trial court charge the jury in accordance with the definition of mental responsibility found in the Modern Penal Code, as adopted by the American Law Institute (ALI) as follows:

> "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

This definition has received acceptance in some of the various Circuits, but confusion and inconsistency still exists among the several circuits and even within them.

The petitioner believes that the following currently sets forth the respective approaches of the several Federal Courts of Appeals to this issue:

District of Columbia Circuit. The *McDonald-Durham* Rule, as initially pronounced for the Circuit in *Durham* v. *United States,* 214 F. 2d 862 (1954);

First Circuit, no authoritative decision;

Second Circuit, The American Law Institute proposal as embodied in paragraph 4.01 of its model penal code. *United States* v. *Freeman,* 357 F.2d 606 (1966).

Third Circuit, a modification of the American Law Institute proposal. *United States* v. *Currens,* 290 F.2d 751 (1961).

Fourth Circuit. Apparently a modification of the American Law Institute proposal, *United States* v. *Chandler* (not yet reported) April 4, 1968. Prior to this decision, there appeared to be no definitive decision although there were "right and wrong" references in *Hall* v. *United States,* 295 F.2d 26 (1961).

Fifth Circuit. Apparently a McNaghten variation. *Howard* v. *United States,* 232 F.2d 274. In *Carter* v. *United States,* 325 F.2d 697 in an *en banc* hearing, the Court split without any authoritative holding.

Sixth Circuit. McNaghten and irresistible impulse. *Power* v. *United States,* 282 F.2d 450 (1960).

Seventh Circuit. American Law Institute proposal after August, 1967. *United States* v. *Shapiro,* 383 F.2d 680.

Eighth Circuit. A modification of the American Law Institute proposal. *Pope* v. *United States,* 372 F.2d 710. However, this circuit still has leanings toward *Davis* v. *United States,* 160 U.S. 469 (*Pope* v. *United States,* supra.)

Ninth Circuit. Evidently at the present time, McNaghten and irresistible impulse. *Anderson* v. *United States,* 237 F.2d 118 (1956).

Tenth Circuit. Perhaps a broad approach but similar to the Eighth Circuit. What is essentially the *Davis* charge was approved in *Coffman* v. *United States,* 290 F.2d 219 (1961).

In this case, the trial court apparently hewed to the McNaghten standard of the difference between right-and-wrong test. When the ALI instruction was tendered, the trial court rejected it saying:

> "The Court: And furthermore your own expert said that he did know the difference between right and wrong and I don't think that this instruction applies. Here we have already told them that they may consider the question of his mental disease or defect* in connection with the question of wilfulness, I mean, you are certainly entitled to that kind of instruction but not to an insanity instruction. 'E' is refused." (App. 131)

Apparently, though not clearly expressed in the opinion, the Court of Appeals for the Seventh Circuit, while giving lip-service to the prospective application of the ALI instruction, also applied the antiquated and obsolete McNaghten rule. In the light of the evidence adduced as stated hereinbefore, it may be difficult to reconcile the Court's opinion that "Our review of the record fails to reveal any such proof [of insanity]." In the context of the record, it becomes clear that McNaghten was applied. In holding there was no such defense, the Court of Appeals said:

> "During the cross-examination of Gorman, the prosecutor attempted to examine on the *issue of insanity,* but the defendant successfully objected that *such an issue* was irrelevant because 'We are only going to his state of mind.'" (Op. 16018, A. 3a, our emphasis)

---

* No instruction relating to mental disease or defect was given.

This statement as applied to the record makes it clear McNaghten was applied.

"Q. During the years 1959 through 1963, Mr. Gorman, did you know right from wrong?

"A. In many respects I don't believe that I did.

"Q. Did you know that it was wrong to kill?

"Miss Lavin: Object, your Honor. We have no such contention, we have not made any such contention here.

"We are getting into the McNaghton case.

"The Court: Objection sustained.

"By Mr. Schultz:

"Q. Were you able to choose between right and wrong when you knew right and wrong?

"Miss Lavin: Objection, Your Honor. Same objection.

"We are not making any plea here with respect to the McNaghton case. We are only going to his state of mind.

"The Court: Objection sustained." (A. 69-70)

We believe the right-and-wrong test to establish insanity, as applied here, is long obsolete.** For the guidance of both courts and litigants, in the interest of justice and fair trial of this important and ever-recurring defense, a definitive standard to be applied should be pronounced.

II.

As noted hereinbefore, the trial court refused upon request to define criminal irresponsibility caused by mental disease or defect or by the want of capacity to conform conduct to legal requirements.

No instruction at all was given to define to the jury the thrust or theory of the defense, and the legal aspect from which it should be viewed.

** The timeliness of this precise question is pointed up in the American Bar Association Journal, Vol. 54, June, 1968, Page 566, and especially at Page 568, where Dr. Dia-

Instead, not only was the theory of defense rejected by the Courts below, its thrust, under the instructions given, became a confession of legal culpability. The Court instructed the jury:

> "The defendant's conduct would not be wilful if he acted through negligence, inadvertence, mistake or due to his good faith misunderstanding of the requirements of the law. But I instruct you that the only wrongful purpose or motive which is necessary for the government to prove in this case is the deliberate intention not to file returns which the defendant knew ought to have been filed.
>
> • • •
>
> "Now, you have heard some considerable evidence in this case introduced relating to the defendant's mental and physical condition. Such testimony was introduced or permitted in this trial solely for one purpose and one purpose only and that purpose is so that you may consider whether or not the defendant's mental and physical condition caused the defendant to inadvertently or negligently fail to make his income tax returns for the years 1959 through 1963." (A. 140-141)

It is beyond cavil that a defendant is clearly entitled to an instruction on his theory of defense. The most the trial court did—as approved by the Court of Appeals—was to tell the jury to "consider" or think about this petitioner's mental condition, but no guide was given as to the standards to be applied in that consideration.

** (Continued)
mond, author of Criminal Responsibility and the Mentally Ill, asserts that only perjury on the part of a psychiatrist and satisfy the literal defense of the M'Naughton Rule in that every defendant, no matter how mentally ill, no matter how advanced his psychosis, knows the difference between right and wrong.

The foregoing instruction has been reproduced in the opinion, and stands as a proper standard for weighing evidence of mental incapacity. Backed by no authority other than this opinion, it is binding on the many courts of this Circuit when confronted by extensive evidence of what the court below defines as "emotional stress." Its approval invites error, and the instruction—now endorsed and sanctioned—should not stand as a standard to the end that mental instability is eradicated as a defense.

This decision refutes the fundamental constitutional right of a defendant to have a jury consider his defense under a defined guide as to its legal impact. The refusal to instruct on a theory of defense—especially on this most common of defenses—is the equivalent of no trial at all, and conviction may as well be had on a grand jury presentation.

III.

Though the trial court recognized that the defense was composed of "some considerable evidence relating to the defendant's . . . mental condition," the Court of Appeals re-evaluated the evidence and concluded the "insanity" issue had not been raised by "some evidence." In the light of the extensive evidence, the decision strikes mental instability as a defense in this Circuit.

Even the harshly diluted statement of the evidence in this case, as reflected by the opinion, still portrays a man suffering from "mental stress", a "psychoneurotic reaction depressive type", "a psychological disturbance, amounting to something more than worry, but something less than insanity", and "emotional stress . . . intensified." (A. 1a-3a)

The evaluation of other courts on what constitutes "some evidence" sufficient to raise the issue of mental instability differs grossly from this decision.

In *Tatum* v. *United States,* 190 F. 2d 612, D.C. Circuit, the only evidence was testimony that the defendant "didn't act normal" and that he seemed "more or less in a trance". The defense in that case was that the defendant "remembered nothing". This case was reversed and remanded. The critical aspect of this case is found in the following:

> "In view of these authorities, it seems clear to us that sanity is an 'essential' issue which, if actually litigated—that is, if 'some proof is adduced' tending to support the defense—must be submitted to the jury under the guidance of instructions.
>
> *"We are aware, of course, that any attempt to formulate a quantitative measure of the amount of evidence necessary to raise an issue can produce no more than an illusory definiteness.* But if some such measure is to be attempted, we think the best approach is that expressed by us in Kinard v. United States, a prosecution for murder in which the trial judge had not submitted the issue of manslaughter to the jury. We said there that 'The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter or an act performed in self-defense, and yet, so long as there was *some evidence relevant to the issue* of manslaughter, the credibility and force of such evidence must be for the jury, and *cannot be matter of law* for the decision of the court.' " [Emphasis supplied.]
>
> "We think *it would be incorrect to infer* from the language in Holloway v. United States *that the 'evidence sufficient to create a reasonable doubt' test is to govern* for the purpose of determining when an instruction should be given. The reference in that case was addressed to the nature of the instruction rather than to the state of the evidence making it 'essential' that it be given. A rule that an instruction should be given only when an accused presented evi-

dence 'sufficient to create a reasonable doubt' would tend to give the presumption of sanity greater effect than appears to have been intended in the Davis case, relied upon in Holloway. The result might be to remove the question of sanity from the jury despite the fact that 'some proof is adduced' in support of the defense, and even though the jury is at liberty to reject the opinion evidence of prosecution experts —to believe and disbelieve witnesses, including the accused, as it wishes.

"In sum, the function of the trial court in regard to the issue of sanity is to determine whether that issue is brought into the case by evidence. If it is, then it should be submitted to the jury with instructions that if the jury has a reasonable doubt of the defendant's sanity, there must be an acquittal."

• • •

"We do not intend to characterize the case for the defense as either strong or weak. That is unnecessary, for 'in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own.'" *Tatum* v. *U.S.*, 190 F.2d 612, 615-617 (our emphasis)

In *Hall* v. *United States*, 295 F.2d 26 (C.A. 4), the *Tatum* case is cited with approval as also is *Lee* v. *United States*, 91 F.2d 326 (C.A. 5). Judge Soboloff reviewed the measure of evidence in the following words:

"*No quantitative measure is prescribed anywhere, nor could one be formulated, that would enable a trial judge to determine precisely and automatically how much evidence is sufficient to raise an issue as to sanity of the accused.* Perhaps our best approach to the inquiry whether the evidence was sufficient in this case to require submission of the issue to the jury,

would be to consider a few of the decided cases dealing with similar questions and see what was there deemed sufficient. In Tatum v. United States, 1951, 88 U.S.App.D.C. 386, 190 F.2d 612, 616, decided by the Court of Appeals for the District of Columbia Circuit three years before Dunham v. United States, 1954, 94 U.S.App.D.C. 132, 214 F.2d 862, 45 A.L.R.2d 1430, the defendant was on trial for rape of a nine year old child. The only evidence raising any doubt as to his sanity was a lapse of memory claimed by the defendant, a statement by a deputy coroner that when brought before him the day after the crime 'the man appeared to me to be in more or less of a trance,' and the testimony of a police officer that the defendant's appearance was 'abnormal.' The only psychiatric testimony was that of two experts, both of whom expressed the opinion that the appellant was of sound mind. Even his court-appointed lawyer, hoping to avert a capital sentence at the hands of the jury, made a concession of the client's guilt in his summation to the jury. On appeal the only points raised were first, whether the jury improperly exercised its statutory authority to sentence the defendant to death, and second, whether there was error in the trial court's refusal to grant a continuance as requested in order to produce an additional witness. Nevertheless, the Court of Appeals *sua sponte* held that enough evidence had been introduced to raise an issue as to sanity which should have been submitted to the jury under the guidance of instructions by the court. Basing its action on the Davis case, the court stated:

> 'In view of these authorities, it seems clear to us that sanity is an "essential" issue which, if actually litigated—that is, if "some proof is adduced" tending to support the defense—must be submitted to the jury under the guidance of instructions.' 190 F.2d at page 615.

"The District of Columbia Circuit is not alone in the view that even under the traditional right and wrong test of criminal responsibility, only slight evi-

dence will suffice to overcome the presumption of sanity and create an issue for the jury. The Fifth Circuit in Lee v. United States, 1937, 91 F.2d 326, at pages 330-331, certiorari denied 302 U.S. 745, 58 S.Ct. 263, 82 L.Ed. 576, has held that:

> 'While an accused is presumed to be sane, the presumption is rebuttable and only *slight evidence* to the contrary, admitted in the course of the trial, is sufficient to raise the issue, to be submitted to the jury, with all the other evidence, without shifting the burden of proof. Davis v. U.S., 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed. 499.' (Emphasis supplied.)

"The evidence requisite to raise the question of sanity for the jury's determination may be slight and not such as to generate a reasonable doubt. Judge Rives, relying on the Davis case, supra, has expressed well the quantum of evidence which will suffice to create a jury question. 'To require submission of the issue of insanity, the evidence need not appear to the court sufficient even to raise a reasonable doubt of sanity, for evidence of that weight would demand acquittal.' See his dissent in Howard v. United States, 5 Cir., 229 F.2d 602, at page 606, but *on this point his view was adopted by the majority on rehearing.* Howard v. United States, 5 Cir., 1956, 232 F.2d 274. See also: Rivers v. United States, 9 Cir., 1959, 270 F.2d 435, certiorari denied 1960, 362 U.S. 920, 80 S.Ct. 674, 4 L.Ed.2d 740; Pollard v. United States, 6 Cir., 1960, 282 F.2d 450; and Fitts v. United States, 10 Cir., 1960, 284 F.2d 108."

* * *

"The testimony of Dr. Elmer Klein, the Government's psychiatric witness, as it related to Hall was that he was 'of rather limited intelligence,' although he thought that 'despite his low level of intelligence he did know right from wrong.'

"A jury issue is thus presented notwithstanding one expert's opinion that Hall had the ability to distinguish between right and wrong, especially when the

other expert testified that this defendant, who was described as a 'moron' (intellectual age 7 to 9, emotional age 5 to 8) possessed a diminished capacity, 'far below the average,' to make such distinction. *It is for the jury to make its own judgment upon the facts,* and it is within its province to agree or disagree with the opinion of any expert. Holloway v. United States, 1945, 80 U.S.App.D.C. 3, 148 F.2d 665, certiorari denied 1948, 334 U.S. 852, 68 S.Ct. 1507, 92 L.Ed. 1774; United States v. Gundelfinger, D.C. W.D.Pa. 1952, 102 F.Supp. 177; 7 Wigmore, Evidence, § 1920, § 1921, § 1937 (1940 ed.); Weihofen, Insanity as a Defense in Criminal Law, (1933) page 222.

"We must therefore conclude that the initial presumption of sanity was dislodged by the testimony, thus creating an issue for the jury.

"Reversed and Remanded for a New Trial." *Hall* v. *United States,* 295 F.2d 26, 28-30 (our emphasis).

See particularly *Howard* v. *United States,* 5 Cir., 232 F. 2d 274, cited in *Hall* where, in reversing on rehearing en banc, the majority in applying the "proper test of criminal responsibility" defined it as follows:

"Only slight evidence of insanity of a defendant at the time of commission of the act is required to raise the issue for submission to the jury.

"We think, however, that the district court imposed upon the defendant too heavy a burden when it charged that the presumption of sanity continues 'until the contrary is shown by proof,' and again, 'until he is proven to be insane.'

* * *

"The district court further erred in its charge in requiring the defendant to adduce proof *both* that he did not know the difference between right and wrong *and* that he was unable to refrain from doing wrong. Either condition existing at the time of the commis-

sion of the act and as the result of some mental defect or disease was sufficient to make the defendant not guilty." *Howard* v. *United States,* 5 Cir., 232 F. 2d 274, 276.

In the petitioner's case, however, we have not only the testimony that he was undergoing psychiatric treatment by Dr. Madden, who at the time of trial was deceased, that he was hospitalized at Sacred Heart Sanitarium in Milwaukee, Wisconsin, that his behavior was such that it demonstrated emotional distress but the defense also had the testimony of Dr. Zyporin as above indicated. Even the Government conceded on final argument that "something was wrong".

> "Now, the government is not contending, and we have never contended, that the defendant, Mr. Gorman, was a strong 100 per cent healthy he-man during this period. We are not alleging that. We don't contend it. It is not true. He was not. Obviously there was something wrong. Something wrong. Well, something wrong? Everyone of us in our lifetime have something wrong at one time or another.
>
> "His gross income fell, it fell from a substantial amount in 1959 to $10,875 gross income in 1962. Then it went back up to over $40,000 in 1963. In 1960 it was $23,000. Gross income. $23,000 gross income. It fell and it went back up. Yes, obviously, there was something wrong.
>
> "But we are not saying that there was nothing wrong. He went to the Sacred Heart Sanitarium. He wants you to believe that the Sacred Heart Sanitarium was an insane asylum. But his mother was there, too. Remember he said that he had been there many times. His mother was there. It is not an insane asylum." (App. 131-132)

Similarly, in the cases where the ALI instruction was approved as appropriately given or to be given, the facts recited would, by comparison with the facts in this case, compel a conclusion directly opposite to that reached here.

In *United States* v. *Freedman,* 2 Cir., 257 F.2d 606, the irresponsibility stemmed from drug and liquor addiction leading to an inability to know what one is doing and where one is. However, the testimony was that the defendant had an awareness of what he was doing as to the events charged, but he was unaware of implications to the nature and meaning of what he was doing. (357 F.2d at 609-612) In like matter, *United States* v. *Malafronte,* 2 Cir., involved chronic alcoholism, which according to the testimony caused damage to the brain cells "leading to difficulty in making moral judgments and an inability to understand the significance of his acts." (357 F.2d at 630) In *Pope* v. *United States,* 8 Cir., 372 F.2d 710, the defense of irresponsibility centered on the contention by the defendant that he had absolutely no motive or reason for the commission of the crime, from which single fact it was opined that he was suffering from a schizophrenic reaction (372 F.2d 719). In *United States* v. *Currens,* 3 Cir., 290 F.2d 751, the evidence was that the defendant, a person of above average intelligence, ordinarily affable, was subject to occasionable explosive and irrationable courses of conduct. It was testified that he knew the difference between right and wrong but would not adhere to the right. The psychiatrist testifying would not say that he was subject to irresistible impulses, but rather that he reacted without due regard for consequences and that his illegal and anti-social conduct was repetitive and an outgrowth of his type of personality and as such, he could not be considered a mentally healthy person. The evidence continued:

"The Doctor also said that Currens was not *'insane'* in the sense that that legal, non-medical, term is employed, that the term 'sociopathic personality' is not a term precisely indicating a mental illness but that it does have 'mental implications'. He stated also that: 'It is a very fine line, as I pointed out before, between the psychopathic type of personality, and a true mental psychotic personality.', and that *'We do not use the word "sane" or "insane" in medicine.'* Dr. Bowers would not say that Currens was schizophrenic but indicated that he might be schizoid and that he had symptoms, as shown by 'the schizophrenia tendency'. He stated, nonetheless that the schizoid personality and the sociopathic personality are closely related." *United States* v. *Currens*, 3 Cir., 290 F.2d 751, 756. (our emphasis)

In the light of these authorities—all overwhelmingly consistent with the arguments of the petitioner and none inconsistent—reconciliation with the decision in this case is impossible. If it suffices simply to say that no case was made out (relying as the court below does, entirely on those aspects of the testimony that make the issues uncertain and thus a jury question) the guarantee of trial by jury is effectively destroyed.

The Court of Appeals, notwithstanding the recognition of a defense by the prosecution, and notwithstanding that the trial court described the defense as "some considerable evidence relating to defendant's . . . mental condition", re-evaluated the evidence and concluded there was none. We submit that the *de novo* re-evaluation not only conflicts with all established authority, but exceeds appellate jurisdiction. Assessment of the value and worth of evidence is confined exclusively to a jury properly instructed and is beyond the domain of any Court.

IV.

The court's attention is respectfully directed to *Tatum* v. *United States,* 190 F.2d 612 where the Court stated at page 615:

> "When lack of mental capacity is raised as a defense to a charge of crime, the law accepts the general experience of mankind and presumes that all people, including those accused of crime, are sane. But as soon as "some evidence of mental disorder is introduced, the prevailing rule in most jurisdictions is that sanity, like any other fact, must be proved as part of the prosecution's case beyond a reasonable doubt." That is the rule followed by the Supreme Court and by this court. The leading authority on the subject is *Davis* v. *United States,* where the Supreme Court said 'Strictly speaking, the burden of proof * * * is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime.'" *Tatum* v. *United States,* 190 F.2d 612, 615.

It is generally accepted that when a lack of mental capacity is raised as a defense to a charge of a crime, the law presumes that the defendant is sane, but as soon as some evidence of mental disorder is introduced, sanity must be proven beyond a reasonable doubt as a part of the prosecution's case. In this respect see the following cases: *Jones* v. *United States,* 284 F.2d 245; *Durham* v. *United States,* 214 F.2d 862; *United States* v. *Westerhausen,* 283 F.2d 844.

In the case at bar the petitioner by his testimony and by the expert witness Zyporin, raised the question of sanity. No effort was made by the government to overcome this testimony. It is the respectful submission of this petitioner that the court under the circumstances should have granted the motion for judgment of acquittal,

for the reason that the government had not met its burden as to each and every element of the offenses charged, and particularly as to his capacity to commit the crimes.

Relieving the government of its burden of proof on the charges it brought against the petitioner strikes at the heart of the requirements of criminal law. Its discouragement must be incisive.

V.

Article 3, Section 2, Clause 3 of the United States Constitution requires that criminal trials shall be held in the State where the said crime shall have been committed; or when not committed within any State, at such place as the Congress may by law, have directed. The Sixth Amendment to the Constitution of the United States secures to an accused the right to a trial by an impartial jury of the State's and District wherein the crime shall have been committed, which District shall have been previously ascertained by law. The United States Supreme Court in *United States* v. *Johnson,* 322 U.S. 273 defined questions of venue in criminal cases as, not merely matters of formal legal procedure, but as raising deep issues of public policy in the light of which legislation must be construed. (323 U.S. at 276)

The indictment, and each count thereof, charges in substance that the petitioner was a resident of the Northern District of Illinois, and that he was required by law to file tax returns with the District Director of Internal Revenue for the *Chicago Internal Revenue District at Chicago, Illinois,* and that he wilfully failed to do so. On its face, the indictment appears to correctly charge venue. The proof at trial showed that he was a resident either of Oak Park or Chicago, Illinois, and he had his principal

place of business in Chicago, Illinois. The question of whether or not that establishes venue depends on whether the crime charged occurred at the place of the Chicago Internal Revenue District Office. This in turn depends on whether the law requires residents of Oak Park and Chicago, Illinois, to file returns in the Chicago Office of the Internal Revenue District.

The venue of a federal offense committed solely by an accused's failure to perform a statutory duty is determined by the general rule that where the crime charged is a failure to do a regularly required act, the place fixed for its performance, fixed the situs of the crime. This is true even if the result is that trial occurs in a District remote from the District of the accused's residence. *United States* v. *Anderson,* 328 U.S. 699; *Johnston* v. *United States,* 351 U.S. 215; *United States* v. *Lombardo,* 241 U.S. 73; *Rumely* v. *McCarthy,* 250 U.S. 283; *New York C & H RR. Co.* v. *United States,* 2 Cir., 166 F. 267.

It is thus clear that the Northern District of Illinois is the correct place of venue only if the law requires petitioner to file his returns in Chicago, Illinois.

Title 26, United States Code, Section 6091, provides that income tax returns of individuals "shall be made to the secretary or his delegate in the Internal Revenue District in which is located the legal residence or principal place of business of the person making the return, * * *." Regulation 1.6091-2 is to the same effect. It therefore becomes important to determine whether petitioner's residence and place of business, to wit, Oak Park, Illinois, lies within the geographical boundaries of the Chicago Internal Revenue District.

In enacting the Internal Revenue Code of 1954 Congress provided that the President of the United States

should establish Internal Revenue Districts and their boundaries. Title 26, United States Code, Section 7621, Internal Revenue Code of 1954, reads:

> "§7621. Internal revenue districts.
>
> "(a) Establishment and alteration. The President shall establish convenient internal revenue districts for the purpose of administering the internal revenue laws. The president may from time to time alter such districts.
>
> "(b) Boundaries. For the purpose mentioned in subsection (a), the President may subdivide any State, Territory, or the District of Columbia, or may unite two or more States or Territories into one district."

The detailed discussion in the house reports concerning the aforementioned section of the Code reads as follows:

> §7621. Internal revenue districts.
>
> "This section corresponds to section 3650 of the 1939 code, but the special provisions of existing law which relate to the Territory of Hawaii and which further provide that States may be subdivided or may be united into 1 district (but 1 district cannot include part of 2 different States) have been eliminated as unnecessary detail for the reason that internal revenue districts now are merely established for internal administrative convenience." *United States Code Congressional and Administrative News*, 83rd Congress, 2nd Session, 1954, page 4585.

The President has not exercised the authority delegated to him by Congress in Section 7621 of the Internal Revenue Code of 1954. By executive order he has sought to delegate some responsibility to the Secretary of the Treasury. See Executive Order No. 10289, September 17, 1951, and Executive Order No. 10574, November 5, 1954.

The opinion of the United States Court of Appeals for the Seventh Circuit states that in making this argument petitioner ignores Section 7851(b)(2) of the Code

(26 U.S.C., §7851(b)(2)) which provides that the repeal of the Internal Revenue Code of 1939 will not affect established Internal Revenue Districts. The opinion continues saying that in 1946*** the Secretary of the Treasury divided Illinois into two collection districts, one of which is encompassed in Cook County, (The county in which Chicago and Oak Park, Illinois, are situated). In the reasoning of the United States Court of Appeals for the Seventh Circuit, it neglects to show wherein the Secretary of the Treasury had the right to establish collection districts in 1946. The establishment of districts began with President Abraham Lincoln designating (50 years before the enactment of the 16th Amendment) 13 Illinois collection districts for supporting the government in paying interest on the public debt. So far as we are advised, it was not *until 1949* that the President of the United States transferred his functions to the Secretary of the Treasury. (See 15 F.R. 4935) We are not directed to any authority under which the Secretary of the Treasury established collection districts in 1946, in order that the provisions of 26 U.S.C. 7851 would be of any legal effect, nor has, in the course of this litigation, the government directed us to the authority under which collection districts were established except in an informal way to accommodate the internal functions of the Internal Revenue Service, but without any binding effect under law on the general public.

We agree with the Court of Appeals for the Seventh Circuit that "Congress intended no such ludicrous result [that no one could be prosecuted for failure to file tax returns]." In fact Congress expressly delegated the function to the President of the United States and he, in turn, delegated it to the Secretary of the Treasury. The

*** The direction to report a collection office is not authority to create a collection district.

Treasury Department has not assumed its delegated function.

It is unfortunate if the "result" was not what Congress intended. The fact is that there is no common criminal law in the laws of the United States. The fact is that criminal statutes require strict construction, and there is no leeway for implementing good intentions, nor is there provision for the judiciary, by decision, supplementing the omission of the executive to do acts delegated by the legislative. Thus the Court of Appeals' emphasis on where petitioner lived or where was his place of business has nothing to do with where he should perform an action, the omission of which is charged as a crime. Venue is an essential element that cannot be supplied by surmise or intendment.

Venue, on the other hand, is not a necessary element in civil actions, and harsh civil penalties are provided for omission to file income tax returns. But the liberality of interpretation in this decision as it relates to criminal law and criminal penalties under the federal law is improper.

There is a growing awareness of this deficiency in the Internal Revenue Laws. It will be a recurring question —again and again relitigated—unless it is here resolved, or the Executive acts.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

ANNA R. LAVIN

EDWARD J. CALIHAN, JR.

Attorneys for the Petitioner.

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1967 JANUARY SESSION, 1968

No. 16018
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
RICHARD E. GORMAN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 5, 1968

Before CASTLE, FAIRCHILD and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* A jury found defendant guilty of failing to file federal income tax returns with the District Director of Internal Revenue in Chicago, Illinois, in the years 1959-1963, inclusive, in violation of Section 7203 of the Internal Revenue Code (26 U.S.C. § 7203). Sentences totaling three years were imposed under the five counts of the indictment.

The evidence showed that although defendant filed income tax returns for the years 1954 through 1958, he failed to do so for the five ensuing years.

During the summer of 1959 defendant was accused of subornation of a juror in the January 1959 criminal trial of his client, Gerald Covelli. Gorman's defense in

this action was that the resulting mental stress caused him to neglect filing the tax returns in question. His indictment for subornation of a juror occurred in June 1960. He was acquitted of that offense in December 1962.

In response to a hypothetical question, psychiatrist Dr. Marvin Ziporyn testified that defendant had "a psychoneurotic reaction, depressive type," but that his ability to reason logically was unimpaired. Dr. Ziporyn also testified that such a psychoneurotic "is aware of reality," and that defendant "knew right from wrong" and was not psychotic. He described Gorman's condition as "not uncommon."

Defendant's principal argument is that the District Court erroneously refused to give the following insanity instruction:

> "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

When applicable, such an instruction is to be given in this Circuit in trials commenced after August 1967.[1] However, a defendant must introduce some evidence of insanity before he is entitled to any insanity instruction. *Tatum* v. *United States,* 190 F.2d 612 (D.C. Cir. 1951); *Smith* v. *United States,* 272 F.2d 547, 548 (D.C. Cir. 1959); *Hall* v. *United States,* 295 F.2d 26 (4th Cir. 1961). Our review of this record fails to reveal any such proof, so that an insanity instruction was properly denied. Idiosyncratic behavior and irresponsibility are insufficient to warrant such an instruction. *Smith* v. *United States,* 272 F.2d 547 (D.C. Cir. 1959); *Smith* v. *United States,*

---

[1] *United States* v. *Shapiro,* 383 F.2d 680, 687 (7th Cir. 1967). The present trial occurred in September 1966. The history of insanity instructions in this Circuit is contained in *Shapiro* and *United States* v. *Williams,* 372 F.2d 76 (7th Cir. 1967), certiorari denied, 389 U.S. 880.

353 F.2d 838 (D.C. Cir. 1965), certiorari denied, 384 U.S. 974. In reality, defendant's theory advanced to justify acquittal was lack of willfulness. Such a theory is frequently used in failure to file tax return cases, as distinct from an insanity defense. As Justice Jackson observed in *Spies* v. *United States,* 317 U.S. 492, 493, "Petitioner's testimony related to * * * lack of willfulness in his defaults, chiefly because of a psychological disturbance, amounting to something more than worry but something less than insanity." Here too lack of willfulness, not insanity, was Gorman's theory.

It is true that defendant did portray his emotional stress, apparently intensified by the subornation of perjury charge, but no evidence was introduced to show that he was insane during these five years. The District Court took account of Gorman's mental condition in instructing the jury as follows;

> "Now, you have heard some considerable evidence in this case introduced relating to the defendant's mental and physical condition. Such testimony was introduced or permitted in this trial solely for one purpose and one purpose only and that purpose is so that you may consider whether or not the defendant's mental and physical condition caused the defendant to inadvertently or negligently fail to make his income tax returns for the years 1959 through 1963."

That instruction properly told the jury to consider defendant's "mental condition" before rendering its verdict. It was then for the jury to decide whether the evidence of Gorman's mental condition merited acquittal. Kalven & Zeisel, *The American Jury* (1966) pp. 301-305.

During the cross-examination of Gorman, the prosecutor attempted to examine on the issue of insanity, but the defendant successfully objected that such an issue was irrelevant because "We are only going to the state of mind." Likewise, Gorman's counsel's opening and closing statements did not advance the defense of

insanity. A search of the record indicates that this defense was never presented, perhaps because of defendant's expert witness' testimony that Gorman was not psychotic. Since Gorman never tendered the issue of insanity, it was unnecessary for the Government to prove his sanity beyond a reasonable doubt. *Smith* v. *United States,* 353 F.2d 838, 843 (D.C. Cir. 1965), certiorari denied, 384 U.S. 974.

Because of the absence of evidence of insanity and because the defendant objected to any insanity inquiry by the Government, the District Court was justified in concluding that said defense had not been raised. Therefore, the insanity instruction was properly refused.

Gorman also argues that the District Court improperly refused to receive proffered testimony (1) of United States District Judge Perry, who presided at the Gerald Covelli trial and testified for Gorman in his ensuing subornation trial and (2) of George Callaghan, counsel for Gorman's co-defendant in the subornation case, concerning the perjurious character of Covelli. Gorman sought to introduce such testimony to show his lack of willful intent to omit filing his income tax returns during these five years. It would tend to show that Gorman was innocent of the subornation offense, but this had already been shown by Gorman's testimony that he was acquitted in December 1962. The fact that Judge Perry testified for Gorman in his subornation trial and agreed with the acquittal verdict would not show that the indictment had a deleterious effect on Gorman, nor would Callaghan's testimony that Covelli was a self-confessed perjurer. Furthermore, the jury had already heard Gorman's testimony that Covelli had testified in a Texas trial that he would commit perjury to avoid trouble.

We agree that the District Court could properly conclude that the offered testimony had insufficient probative value to be admitted. It was of course the trial court's duty to exclude remote evidence. *United States* v. *Maryland & Virginia Milk Producers Association,* 20 F.R.D.

441, 442 (D. D.C. 1957). As noted in McCormick on Evidence § 152, three factors justifying exclusion of evidence are: danger of jury prejudice, danger of jury distraction by creation of side issues, and consumption of undue amounts of trial time. All these factors were present here. Juror Laux was personally acquainted with Judge Perry and could have been prejudiced by Judge Perry's appearance as a witness. A retrial of the suborning perjury charges would certainly be a confusing side issue. It would also consume unnecessary time. In our view, the District Court's action in excluding this evidence was well within its power to keep out remote evidence. *Continental Ore Co.* v. *Union Carbide & Carbon Co.*, 370 U.S. 690, 710.

Relying on *Carter* v. *United States*, 373 F.2d 911, (9th Cir. 1967), *Young* v. *United States*, 346 F.2d 793 (D.C. Cir. 1965), and *United States* v. *Kelley*, 314 F.2d 461 (6th Cir. 1963), Gorman asserts that he was deprived of the effective assistance of counsel because the District Court threatened his lawyers with contempt. In *Carter*, the conviction was affirmed. In both *Young* and *Kelley*, the prejudicial effect on the jury of the trial judges' remarks occasioned the reversals, but here the warning was given outside the presence of the jury. Moreover, in *Kelley* the trial court had incorrectly limited defense counsel's cross-examination, whereas here defense counsel persisted in attempting to bring before the jury evidence that the District Court had already properly ruled to be inadmissible. It was entirely appropriate for the District Judge to warn Gorman's lawyers of the consequences of their persistence in attempting to prejudice the jury by showing that Judge Perry had appeared as a witness for Gorman in his subornation trial. *United States* v. *Bolden*, 355 F.2d 453, 457 (7th Cir. 1965), certiorari denied, 384 U.S. 1012.[2]

---

[2] Defendant's attack on three other rulings of the District Court in no way shows that he was deprived of effective assistance of counsel and merits no discussion.

Gorman was not permitted to introduce certain of his cancelled 1959-1963 checks, one series of which was payable to the order of cash and the other series payable to the order of specific payees. These were offered to show his business expenses. Under the statute (26 U.S.C. § 7203), the Government had to show that defendant was required to file a return, that he did not do so, and that his failure to file was willful. *Yarborough* v. *United States,* 230 F.2d 56, 61 (4th Cir. 1956), certiorari denied, 351 U.S. 969. The Government was not required to prove that Gorman owed the Government any tax.

If Gorman had offered evidence that his failure to file was not willful because only a minimal tax was due, the checks would have been admissible. *Cf. Womack* v. *United States,* 336 F.2d 959 (D.C. Cir. 1964). However, he testified that he was knowledgeable in the field of tax law and knew he was obligated to file a tax return if he had gross income in excess of $600, whether or not any tax was due. Therefore, proof that he owed a minimal tax was not relevant. See *Silverstein* v. *United States,* 377 F.2d 269, 270-271 (1st Cir. 1967).

To support the admissibility of the checks, defendant relies on *Lumetta* v. *United States,* 362 F.2d 644 (8th Cir. 1966). There the Government was permitted to show the corporate income of Stephens Cement Contractors, Inc., of which Lumetta was president, to show "that Stephens was a going concern dealing in substantial amounts of money and operating at a profit; and that had Lumetta filed a return [for Stephens] it would have shown a tax owing to the government." 362 F.2d at pp. 645-646. The evidence was admitted to combat the "defenses interposed," one probably being that no tax was due. 362 F.2d at p. 646. Here the testimony shows that the amount of tax owing was not the reason Gorman did not file his tax returns, so that proof of tax liability was irrelevant.

Defendant also complains that it was unfair to receive testimony from a bookkeeper as to the amount of his

paid office rent. Since defense counsel elicited the amounts of the annual payments from this witness, Gorman can hardly object to their receipt. Furthermore, there were no suggestions to the jury that these were Gorman's only deductible expenses.

Defendant's principal brief complains of the phrase "in order to prevent the government from knowing the extent of his tax liability" in the willfulness instruction given.[3] Because this phrase was added by the District Court at the suggestion of Gorman, he cannot now complain of its inclusion. *United States* v. *Echeles,* 222 F.2d 144, 152 (7th Cir. 1956), certiorari denied, 350 U.S. 828. Similarly, he cannot in his reply brief raise the deletion of "without justifiable excuse" from the same instruction. See Rule 17(a) of this Court.

Defendant's final point, first asserted in his post-trial motion for acquittal, is that there was no venue in the Northern District of Illinois. Defendant's residence was either in Chicago or suburban Oak Park, Illinois, and his place of business was in Chicago. Therefore, there was venue below if his returns had to be filed with the District Director of the Internal Revenue District in Chicago.

Section 6091 of the Internal Revenue Code of 1954 (26 U.S.C. § 6091) requires individuals to file their income tax returns in the internal revenue district of their legal residence or place of business. Defendant contends that there is no venue on the ground that neither the President nor his delegate, the Secretary of the Treasury, has established any internal revenue districts under Section 7621 of said Code (26 U.S.C. § 7621), which provides:

---

[3] The willfulness instruction was as follows:

"The word 'wilfully' used in connection with this offense means deliberately, intentional or with wrongful purpose of deliberately intending not to file a return which the defendant knew he should have filed in order to prevent the government from knowing the extent of his tax liability."

§ 7621. Internal revenue districts.

"(a) Establishment and alteration.—The President shall establish convenient internal revenue districts for the purpose of administering the internal revenue laws. The President may from time to time alter such districts.

"(b) Boundaries.—For the purpose mentioned in subsection (a), the President may subdivide any State, Territory, or the District of Columbia, or may unite into one district two or more States or a Territory and one or more States."

This contention ignores Section 7851 (b) (2) of the Code (26 U.S.C. § 7851 (b)(2)), which provides:

"§ 7851. Applicability of Revenue Laws.

* * *

"(b) Effect of Repeal of Internal Revenue Code of 1939.—

* * *

"(2) Existing offices.—The repeal of any provision of the Internal Revenue Code of 1939 shall not abolish, terminate, or otherwise change—

"(A) any internal revenue district." (Emphasis supplied.)

In 1946 the Secretary of the Treasury divided Illinois into two collection districts, with Cook County, in which Chicago and Oak Park are situated, in the First District (11 F.R. 177A, p. 28). Except for changes in nomenclature, Illinois has subsequently retained the same two collection districts. Inasmuch as Chicago and Oak Park are in the First Collection District (now entitled "District Director, Internal Revenue Service, Chicago, Illinois"[4]), venue was properly laid in the Northern District of Illinois. To hold otherwise would mean that no one could be prosecuted for failure to file tax returns anywhere in the United States. Congress intended no such ludicrous result.

AFFIRMED.

---

[4] See 18 F.R. 3499.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Friday, April 5, 1968

Before

Hon. LATHAM CASTLE, Circuit Judge

Hon. THOMAS E. FAIRCHILD, Circuit Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 16018 *vs.*

RICHARD E. GORMAN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Thursday, May 9, 1968

Before

Hon. JOHN S. HASTINGS, Chief Judge

Hon. ELMER J. SCHNACKENBERG, Circuit Judge

Hon. LATHAM CASTLE, Circuit Judge

Hon. ROGER J. KILEY, Circuit Judge

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. THOMAS E. FAIRCHILD, Circuit Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. RICHARD E. GORMAN, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 16018	

IT IS ORDERED by the Court, En Banc, that the petition for rehearing En Banc in this cause be and the same is hereby denied.

(Judge Kiley did not participate in the vote on the petition for rehearing.)

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Thursday, May 9, 1968

Before

Hon. LATHAM CASTLE, Circuit Judge

Hon. THOMAS E. FAIRCHILD, Circuit Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

UNITED STATES OF AMERICA *Plaintiff-Appellee* No. 16018 *vs.* RICHARD E. GORMAN *Defendant-Appellant*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.

SUPREME COURT, U. S.

JUL 8 1968

JOHN F. DAVIS, CLERK

No. 173

In the Supreme Court of the United States

OCTOBER TERM, 1968

RICHARD E. GORMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
MITCHELL ROGOVIN,
Assistant Attorney General,
JOSEPH M. HOWARD,
JOHN M. BRANT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 173

RICHARD E. GORMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial petitioner was convicted of willfully failing to file individual federal income tax returns for the years 1959 through 1963 in violation of Section 7203 of the Internal Revenue Code of 1954. He was sentenced to three consecutive one year sentences and the court of appeals affirmed. (Pet. App. 1a–9a.) No substantial conflict of decisions is presented, and there is no other reason warranting further review.

1. The Seventh Circuit has previously approved, for trials commenced after August 1967, the American Law Institute instruction on insanity (R. 148)[1] that

[1] "R." refers to the printed appendix filed by petitioner in the court of appeals.

petitioner requested and was refused here. *United States* v. *Shapiro,* 383 F. 2d 680 (C.A. 7); see also, *United States* v. *Williams,* 372 F. 2d 76 (C.A. 7). Petitioner was tried in 1966, and makes no challenge to the decision of the Seventh Circuit to apply the new instruction only prospectively.

2. In no event would this case be an appropriate vehicle for establishing, as petitioner urges (Pet. 17–20), a uniform insanity instruction. At best, the only question presented is whether there was adequate evidence to warrant an insanity instruction. Compare our Memoranda in Opposition in *Ramer* v. *United States,* No. 97 Misc., this Term, and *Church* v. *United States,* No. 141 Misc., this Term.[2] As the court of appeals observed (Pet. App. 2a), such an instruction is required only where some evidence of insanity has been introduced; as that court concluded "this record fails to reveal any such proof"[3]—at most there was a show-

[2] Copies of these documents are being served on petitioner's counsel together with this memorandum.

[3] The record shows that petitioner was actively engaged in the practice of law (including many criminal tax cases) throughout the relevant years (1959 through 1963) and represented about 75 clients each year, including 20 to 30 each year in the federal courts (R. 70–74). He orally argued *James* v. *United States,* 366 U.S. 213, in this Court on November 17, 1960 (R. 79–80). He testified that from the summer of 1959 until he was acquitted in 1962 his "one overriding interest" was to exonerate himself of a bribery charge; that his office rent fell behind; but that by 1963 he "was able to pick up a great deal of that obligation" and paid all the arrears by 1964 (R. 66–67). On the basis of testimony that in 1960 petitioner, previously neat and mentally acute, became slovenly, nervous, forgetful, and unable to make rapid decisions (R. 95–99), and suffered from high blood

ing of "[i]diosyncratic behavior and irresponsibility" (Pet. App. 2a).

3. Moreover, as the court noted (Pet. App. 3a–4a), the defense objected during government cross examination directed at the question whether petitioner knew the difference between right and wrong (R. 70, 130–131), saying, "We are only going to his state of mind." The court instructed the jury that the failure to file returns must be willful ("deliberately, intentional or with wrongful purpose"); that they could not convict if petitioner's conduct was merely negligent or inadvertent; and that they could consider whether "the defendant's mental and physical condition caused the defendant to inadvertently or negligently fail to make his income tax returns." (R. 140–141.) This instruction covered the substance of the "insanity" defense, *i.e.*, petitioner's testimony that he was preoccupied with bribery charges against him, to the neglect of everything else (R. 66), and the medical testimony that people with petitioner's neurotic or anxiety condition no longer care and simply "give up" (R. 122).

4. Venue was not, as petitioner contends (Pet. 32–36), improperly laid. Petitioner's residence was either in Chicago or in suburban Oak Park, Illinois and his place of business was in Chicago. Venue was correctly

---

pressure or hypertension, a psychiatrist replied to a hypothetical question by opining that petitioner had suffered from "a psychoneurotic reaction, depressive type," and that while such a person is aware of his obligations and knows right from wrong, he gives up and believes that "Nothing counts." (R. 119–124.)

laid under Section 6091(b) of the Internal Revenue Code of 1954 (Pet. App. 7a) "if his returns had to be filed with the District Director of the Internal Revenue District in Chicago." See Section 6091 of the Internal Revenue Code of 1954; cf. *Johnston* v. *United States*, 351 U.S. 215, 220; *De Cesare* v. *United States*, 356 F. 2d 107, 108 (C.A. 5). Petitioner's argument (Pet. 34–35) is that the President has not acted upon his authority (26 U.S.C. 7621(b)) to create internal revenue districts, with the result that petitioner could not be prosecuted anywhere for the offenses here involved.

By Reorganization Plan No. 1 of 1952 (17 Fed. Reg. Part 2, p. 2243) the President authorized the Secretary of the Treasury to establish new district offices. Under that authority, the Secretary on May 15, 1952, fixed the place for the filing of petitioner's returns at Chicago.[4] Since Section 7851(b)(2)(A) of the Internal Revenue Code of 1954 provides that repeal of the 1939 Code "shall not abolish, terminate, or otherwise change—(A) any internal revenue district", it is immaterial that the President has not subsequently acted on his authority to establish internal revenue districts.

[4] An office of the Director of Internal Revenue (the name was later changed to the office of the District Director—Treasury Department Order 150–26, 18 Fed. Reg. Part 3, p. 3499) was established at Chicago, Illinois, for the area of northern Illinois, including Cook County. Treasury Department Order No. 150–3, 17 Fed. Reg., Part 3, p. 4590; cf. Bureau of Internal Revenue—Organization, 11 Fed. Reg. Part 9, pp. 177A–22, 28.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
JOSEPH M. HOWARD,
JOHN M. BRANT,
Attorneys.

JULY 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968

SUPREME COURT, U. S.

FILED

SEP 3 1968

JOHN F. DAVIS, CLERK

No. 173

In the

Supreme Court of the United States

OCTOBER TERM, 1968.

RICHARD E. GORMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Seventh Circuit

REPLY TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
53 West Jackson Boulevard
Chicago, Illinois 60604
Attorneys for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968.

No. 173

RICHARD E. GORMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Seventh Circuit

REPLY TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

Your Petitioner, in the reply brief, does not propose to repeat here arguments previously advanced in the Petition. However, the Government, in its brief in opposition to the grant of certiorari, has injected matter into the case, to some of which it is deemed desirable to make a reply.

1. The Respondent argues, we may say gratuitously, that "Petitioner was tried in 1966, and makes no challenge to the decision of the Seventh Circuit to apply the new instruction only prospectively." The ruling of the Seventh Circuit Court of Appeals as it relates to this case was that there was a failure to present any proof of "insanity" and therefore, petitioner was not entitled to a "insanity" instruction (A. 2A). In other words the Seventh Circuit held that it would not apply the ALI instruction in this case for want of sufficient showing by the evidence under any circumstances. The Solicitor errs in his assertion that no challenge was made to the decision of the Seventh Circuit to apply ALI only prospectively after August, 1967. The conflict between the Seventh Circuit in *United States* v. *Shapiro,* 7 Cir., 383 F. 2d 680, and that of the Second Circuit in *United States* v. *Sheller,* 2 Cir., 369 F. 2d 293, was emphatically made in the arguments before that Court in urging that the ALI instruction, as tendered, was appropriate in this cause.

2. The United States suggests under this point that there was no evidence of insanity introduced but only a showing of "idiosyncratic behavior and irresponsibility." Idiosyncratic behavior is, by definition, a mental condition peculiar to a person. (Webster's 20th Century Unabridged, 22d Ed., P. 903). "Derangement" is a disturbance of order. (idem, p. 490). Derangement is insanity (idem, p. 97). This callous indulgence in semantics to defeat an important cause must, we hope, be attributed to an overabundance of work, rather than a disregard for individual liberty.

In this regard it is interesting to note that in a case decided July 30, 1968, in the Second Circuit, Docket No. 31946, slip opinion pg. 3315 (reversed on other grounds),

where the evidence showed, as here, indications of neurotic mental stress, psychoneurotic reaction and depressed behavior, both the prosecution and the trial court showed an awareness of this defense and the necessity of a rebuttal, and an appropriate charge to the jury.

In its opinion, the Court of Appeals stated:

> "During the second trial only two issues were contested: Did the defendant act 'willfully' in failing to file his returns, and was he mentally responsible for his actions? The Government introduced evidence to show Driscoll's ability to handle his affairs—*e.g.*, his successful law practice and major responsibilities, his profitable investments and his active social life—but presented no psychiatric evidence in its case-in-chief. For the defendant, Dr. Lawrence I. Kaplan, a psychiatrist, testified that at the time the tax returns were due Driscoll suffered from a '*character neurosis with* [*a*] *marked difficulty in complying with his responsibilities because of fear of failure.*' The doctor concluded from his examination that:
>
> > In my opinion he did have the type of disorder which would cause him to lack the substantial capacity to conform his behavior to the requirements [of law] and to appreciate the nature of what he was doing.
>
> The defense offered other proof to show appellant's mental deterioration: He procrastinated endlessly when faced with a decision in either business or personal affairs; his desk was a clutter of pending problems and unopened mail; others often had to take over his work to avoid embarrassment to the firm; he was served with seventeen separate dispossess notices for failure to pay rent on the two-room apartment in which he lived alone; his car, accumulating monthly charges of $50, sat unused in a garage from 1963 to 1967.

"In rebuttal, the Government put Dr. Abrahamsen on the stand over a renewal of defendant's pre-trial objections. Relying solely on the two interviews he had conducted under Judge Wyatt's section 4244 order, the doctor testified that while the defendant was 'somewhat depressed and rather uncommunicative,' he was suffering from no more than a 'situational depression.' Such depressions, the doctor explained, are brought on by external events, and they are not mental defects. As a basis for this conclusion, the doctor repeated a number of statements made by the defendant during the interviews. These statements concerned defendant's family, his education, his lack of friends, his eating, sleeping and smoking habits, his prior psychiatric treatment, his rising income and his inability to concentrate on his work." (Emphasis Supplied)

As demonstrated hereafter the Court and prosecution were similarly made aware of the nature of the defense in the case at bar. Thus the 2nd Circuit and the 7th Circuit are in conflict in their treatment of this important defense.[1]

The United States asks this Court wait for "an appropriate vehicle for establishing . . . a uniform insanity instruction." (Ans. p. 2) What is meant by an "appropriate vehicle"? Is one man's liberty more "appropriate" than another? Does not the fact that three cases, the government recognizes, are pounding at this great door

---

[1] The instruction tendered and refused in Gorman was given in Driscoll (Dr. Tr. 876, App. 163a).

The law defines insanity for the purpose of responsibility for criminal conduct as follows:

"A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

make the question "appropriate" whatever the "vehicle"? *When* is anyone going to find that one man's idiosyncracies duplicate anothers since, by definition, idiosyncracies must be uniqqe?

The Solicitor General cites two cases to this court. One, a bench trial (*Ramer* v. *United States,* No. 97 Misc.) where the court concluded that "under any standard" petitioner was not insane (memo U.S., p. 6) and another (*Church* v. *United States,* No. 141 Misc.), where an instruction we would have welcomed was given, no objection was interposed, and no defense instruction on mental instability was proffered.

Though expansive answers on the above cases was made, a mere reference to those "Answers" is urged to control this appeal to this Court herein. We submit we are unfairly treated so that this Court, in its overabundance of work, will ignore the unilateral evidence by the defense of mental instability, the plea for ALI, and an arbitrary determination that what the trial court recognized was "some considerable evidence relating to the defendant's . . . mental condition" was, in the Court of Appeals, "a failure to reveal any such proof [of insanity]."

3. The Solicitor General interposes under this point some theory of waiver of the ALI standard of want of substantial capacity to appreciate wrongfulness of conduct or want of such capacity to conform his conduct to the requirements of law. Waiver, the Solicitor deduces from a statement by defense counsel on trial, quoted in his answer as "We are only going to a state of mind," in connection with an objection made during the course of trial. The purposeful plucking of one sentence from context to defeat a legal defense should not, and we are

sure will not, be tolerated by this Court. The testimony relative to the petitioner's knowledge of the difference between right and wrong was carefully detailed in the arguments below. They are as follows:

> "Q. During the years 1959 through 1963, Mr. Gorman, did you know right from wrong?
> "A. *In many respects I don't believe that I did.*
> "Q. Did you know that it was wrong to kill?
> "Miss Lavin: Object, your Honor. We have no such contention, we have not made any such contention here.
> "We are getting into the McNaughton case.
> "The Court: Objection sustained.
> "By Mr. Schultz:
> "Q. Were you able to choose between right and wrong when you knew right and wrong?
> "Miss Lavin: Objection, Your Honor. Same objection.
> "We are not making any plea here with respect to the McNaughton case. *We are only going to his state of mind.* (Solicitor's Ploy)
> "The Court: Objection sustained." (Tr. 584)

The psychiatrist testified as follows:

> "Q. The defendant certainly knew right from wrong, did he not?
> "A. Yes." (Tr. 898) (Emphasis & Parenthetical Material Supplied)

We did not suggest that Petitioner did not know moral right from wrong. We certainly do not suggest he was irresistably impelled not to do something. McNaghten was not a defense, and recognized and articulated. But if the defense of insanity was not clear, why a question of whether the petitioner would know whether it was wrong to "kill"?

If it is, as we are sure it is, the intention of the Solicitor General to propose that there was an abandonment of the ALI standard, or that the statement of counsel so influenced the prosecutor that he neglected to overcome the evidence showing mental instability, we submit the argument is a specious one. The Court and the prosecution were constantly advised of the nature of the defense.

Opening Statement:

His health deteriorated, his personal appearance deteriorated. He so allowed his health to deteriorate that he is now affected with a permanent limp. He neglected the most basic elements of just self-preservation, neglect.

The evidence will show that he eventually had to seek help, seek help with his health; his family got him to seek psychiatric help; sent him to a sanitarium, all for what? In December, 1962, he was acquitted of the charge. But experiences like that just don't go away overnight. In 1964, as late as that, the evidence will show, that he suffered a near stroke.

This, then, ladies and gentlemen, is what the evidence will show happens to a man, a sensitive man, who is prosecuted wrongfully. (App. 13)

Course of trial:

> "Mr. Calihan: The theory of the defense, irrespective of the unfortunate aspect of somebody, who knew Judge Perry, being on this jury, this was an anticipated defense: That not only would Mr. Gorman testify to the concern with which he had, but there were other people who felt the same way, that there was no reason—
>
> "The Court: Just keep your voice down, please.
>
> "Mr. Calihan: I am sorry, sir.

"(Continuing) That there was no reason for the bringing of this prosecution.

"It so affected this man that it brought about a complete deterioration of him." (App. 64)

• • •

"Miss Lavin: My theory is that this is corroborative of the outraged state of mind that produced this mental instability of the defendant that was the basic cause of this delinquency." (App. 107)

This statement nearly three hundred pages of transcript after the alleged "waiver", was preceded by counsel's query of the Court "Your Honor, you do understand my theory", and the Court's reply "I understand what your theory is." (App. 107) Despite this colloquy and the evidence presented, the trial court persisted in its refusal to give any instruction on mental instability, and the Court of Appeals concurred. Thus it becomes apparent that a theory of defense was recognized, and there was a refusal to charge on it.

The prosecution could not have been so misled as to have been prejudiced in the presentation of a proper assumption of its obligation to prove sanity beyond reasonable doubt. The fact is that mental instability as a jury question constituting a legitimate defense has not been, and should be, defined by this Court for guidance of litigants. The further fact is that there is no way within the bounds of the federal rules that notice of such a defense is provided for—there is no plea of "not guilty by reason of mental instability."

If, on the other hand, it is determined that the phrasing of the objection was so misleading, then, considering the preparation of the defense, the meticulous presentation of that defense by lay as well as expert testimony, this petitioner was afforded representation that was, at least

inept, and at most a waiver of the only defense he had. If his counsel is deemed to have waived his defense, on that account alone we submit that a new trial should be directed, with counsel sufficiently competent not to waive a defense to which the Constitution entitles an accused.

IV.

The Government's argument under this point will be italicized and the Petitioner's response will be made thereafter. The Respondent states:

> *"Venue was laid under Section 6091(b) of the Internal Revenue Code of 1954 (Pet. App. 7) if his returns had to be filed with the District Director of the Internal Revenue District in Chicago".*

The Petitioner has no quarrel with this statement. The question is whether or not there has been a properly constituted Internal Revenue District in Chicago.

Respondent then states:

> *"Petitioner's argument (Pet. 34-35) is that the President has not acted on his authority (26 U.S.C. 7621 (b)) to create Internal Revenue Districts with the result that the Petitioner could not be prosecuted anywhere for the offenses here involved."*

The Respondent thus recognizes the point made by the Petitioner.

Next the Respondent says:

> *"By reorganization plan No. 1 of 1952 (17 Fed. Reg. Part Two, p. 2243) the President authorized the Secretary of the Treasury to establish new District Offices."*

It is the Petitioner's submission that the Plan refers to offices in the sense that new positions were created

as personnel changes. The pertinent provision of that plan reads as follows:

ABOLITION OF OFFICES OF COLLECTORS AND DEPUTY COLLECTORS OF ILLINOIS COLLECTION DISTRICTS; ESTABLISHMENT OF OFFICES OF DISTRICT COMMISSIONER AND DIRECTORS OF INTERNAL REVENUE

By virtue of the authority vested in me as Secretary of the Treasury by Reorganization Plan No. 26 of 1950 and Reorganization Plan No. 1 of 1952:

1. *Abolition of existing offices.* The abolition of the offices of Collector of Internal Revenue and Deputy Collector for the First and Eighth Collection Districts of Illinois shall become effective as of 12 o'clock midnight, May 19, 1952.

2. *Establishment of District Commissioner.* Effective as of 12:01 a.m., May 20, 1952, there is hereby established within the State of Illinois, and for such State, an office of District Commissioner of Internal Revenue.

3. *Name and composition of District.* The District hereby created shall be known as the Chicago District and shall be comprised of the entire State of Illinois.

4. *Location of headquarters.* The headquarters office shall be located in the City of Chicago, Illinois.

5. *Establishment of offices of Director of Internal Revenue.* Effective as of 12:01 a.m., May 20, 1952, there are hereby created the following offices within the Chicago District:

(a) Director of Internal Revenue for the First Collection District of Illinois (*as presently constituted*). Such

office shall have the operating title of Director of Internal Revenue, Chicago.

(b) Director of Internal Revenue for the Eighth Collection District of Illinois (*as presently constituted*). Such office shall have the operating title of Director of Internal Revenue, Springfield.

Dated: May 15, 1952.

[SEAL]

JOHN W. SNYDER,
Secretary of the Treasury.

[F. R. Doc. 52-5570; Filed, May 19, 1952; 8:55 a.m.]
18 F.R. 3499: (Emphasis added)

This Court will note that 5A and 5B use an expression in parentheses "as presently constituted". The thrust of the reorganization plan is one dealing with personnel and the reference so far as districts are concerned relates to districts *lawfully* designated and there were no lawfully designated districts "presently constituted".

The Respondent, in his next sentence, says:

> *"Under that authority, the Secretary, on May 15, 1952, fixed the place for the filing of Petitioner's returns at Chicago."*

The Petitioner contends that this is not a correct statement. The Secretary, in addition to abolishing certain existing offices (personnel), divided the *office* of the Chicago District into the First Collection District of Illinois (*as presently constituted*) and the Eighth Collection District of Illinois (*as presently constituted*).

It is the Petitioner's contention that the words "as presently constituted" relate back to an action by the

Secretary of the Treasury in 1946. This was the action referred to in the footnote of the Respondent's Brief. Footnote 4 reads as follows:

> *"'An office of the Director of Internal Revenue (the name was later changed to the office of the District Director—Treasury Department Order 150-26, 18 Fed. Reg. Part 3, p. 3499) was established at Chicago, Illinois, for the area of northern Illinois, including Cook County. Treasury Department Order No. 150-3, 17 Fed. Reg., Part 3, p. 4590; cf. Bureau of Internal Revenue—Organization, 11 Fed. Reg. Part 9, pp. 177A-22, 28."*

The date of 11 Fed. Reg. Part 9, is omitted but it occurred in 1946. The action taken under 11 Fed. Reg. Part 9, pp. 177A-22, 28 refers to the action in 1946 of the Secretary of the Treasury dividing Illinois into two collection districts, one of which encompassed Cook County (The County in which Chicago and Oak Park, Illinois are situated). This is the unauthorized designation of the district which is the thrust of the Petitioner's contention. The delegation by the President to the Secretary of the Treasury in 1952 cannot cure this unauthorized act in 1946. There were no "districts presently constituted", because there was no earlier authority to constitute or formulate districts.

The next and last sentence of the Respondent's reply reads as follows:

> *"Since Section 7851(b)(2)(A) of the Internal Revenue Code of 1954 provides that repeal of the 1939 Code 'shall not abolish, terminate, or otherwise change — (A) any Internal Revenue District', it is immaterial that the President has not subsequently acted on his authority to establish Internal Revenue Districts."*

This statement does not in any way meet the point. True, the Internal Revenue Code of 1954 in repealing the 1939 Code did not act to abolish, terminate, or otherwise change any Internal Revenue District. However, it is the Petitioner's respectful contention that no district had ever been lawfully established. The only action which in any way related to the establishment of the district took place in 1946, a time prior to the authorization given by the President to the Secretary of the Treasury in the reorganization plan of 1952. The Act of 1954, in not abolishing or terminating any Internal Revenue District, referred to districts "as presently constituted." It is Petitioner's contention that "as presently constituted" means lawful constitution. The whole thrust of the argument is that the designation of Cook County as a part of the collection district in Illinois in the year 1946 was without any authority under law. A subsequent delegation of that authority in 1952 cannot cure the unlawful designation made in 1946.

The Internal Revenue Code of 1954 did not create any districts; it merely stated that it would not abolish, terminate or otherwise change any Internal Revenue District. If the Internal Revenue District in Illinois had not been lawfully created, it was not a district reached by the Revenue Code of 1954.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
Attorneys for Petitioner.

SUPREME COURT, U. S.

No. 173

OCT 1 1968

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968.

RICHARD E. GORMAN,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Seventh Circuit

SUPPLEMENTAL REPLY TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
53 West Jackson Boulevard
Chicago, Illinois 60604
Attorneys for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 173

RICHARD E. GORMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Seventh Circuit

SUPPLEMENTAL REPLY TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

It has lately been called to the attention of Petitioner's attorneys that on July 3, 1968, the Second Circuit, sitting *en banç*, held that the test for determining criminal responsibility as laid down by that Circuit in *United States* v. *Freeman*, 357 F. 2d 606, was reaffirmed and ruled that it should be applied retroactively. This *en banc* consideration was given in *United States* v. *Tarrago*, Docket No.

30416 of the United States Court of Appeals for the Second Circuit, September Term, 1967. To our knowledge, the case has not been reported, and, therefore, a copy of said decision is submitted in the Appendix hereto.

It is respectfully submitted that this case be given consideration together with the Petition for the Writ and Reply heretofore filed herein, as illustrative of the timeliness of the question and the confusion of the Circuit. Further, the *Tarrago* case represents a second time the Government has deemed the question of the application of the ALI standard of criminal responsibility sufficiently important to ask Courts of Appeals to sit on it *en banc*. See also the decision of the United States Court of Appeals for the Seventh Circuit, sitting *en banc* in *United States* v. *Shapiro*, 383 F. 2d 680.

Respectfully submitted,

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
Attorneys for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 196—September Term, 1967.

(Argued November 21, 1967 Decided July 3, 1968.)

Submitted to the *in banc* court May 1, 1968

Docket No. 30416

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHN D. TARRAGO,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*
WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN, HAYS, ANDERSON, and FEINBERG, *Circuit Judges.*

Appeal from a conviction in the United States District Court for the Southern District of New York before Richard H. Levet, *J.*, and a jury for filing a false federal income

tax return for 1956, and for failing to file timely returns for 1957 and 1958. Reversed.

JOSHUA N. KOPLOVITZ, New York, N.Y. (Anthony M. Marra, The Legal Aid Society, on the brief), *for Defendant-Appellant.*

DAVID M. DORSEN, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York; Pierre N. Leval, Michael W. Mitchell, Assistant United States Attorneys, on the brief), *for Appellee.*

FEINBERG, *Circuit Judge*:

Appellant John D. Tarrago was convicted in the United States District Court for the Southern District of New York before Richard H. Levet, *J.*, and a jury of filing a false federal income tax return for 1956 and failing to file timely returns for 1957 and 1958. 26 U.S.C. §§7206(1), 7203. Appellant was sentenced to a prison term of one year and eight months for the first offense, and one year each on the other two; the three sentences were concurrent.[1] The two issues on appeal relate to the test of criminal responsibility used by the jury and the trial judge's refusal to grant appellant a short continuance to obtain

[1]Appellant was also fined $250 on each count.

other counsel.[2] Our disposition of the former makes it unnecessary to rule on the latter. For reasons set forth below, we reverse and remand.

The trial was held in October 1965, at a time when the district courts of this circuit "in the absence of appellate guidance on the subject," see *United States* v. *Freeman,* 357 F. 2d 606, 608 (2d Cir. 1966), were applying the M'Naghten test of criminal responsibility. The evidence on this issue was conflicting, but it should be noted that appellant was twice committed to mental institutions and his expert medical witness offered a diagnosis of "schizophrenic reaction, paranoid type," a psychotic condition "in which a person has lost touch with reality." After having been charged under the M'Naghten rule, the jury returned a verdict of guilty.

A few months later, while Tarrago's conviction was on appeal, the opinion of this court in *United States* v. *Freeman, supra,* was announced. In that case, we adopted as the standard of criminal responsibility for the courts of this circuit the criteria provided by section 4.01 of the Model Penal Code, drafted by the American Law Institute:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of men-

---

[2] The articulated basis for request was that appellant had recently learned that his attorney was under indictment in a federal court in California for interstate transportation of stolen securities, and that appellant felt that he might be prejudiced because of that fact. The attorney has since been convicted of similar offenses in the Southern District of New York. See *United States* v. *Friedland,* Dkt. No. 31474 (2d Cir. March 11, 1968), remanded April 11, 1968 for a hearing pursuant to *Kolod* v. *United States,* 390 U.S. 136 (1968) *(per curiam).* Disciplinary proceedings had been instituted against the attorney 10 months before the trial in this case; final disbarment occurred in August, 1966. *In re Friedland,* 272 N.Y.S. 2d 1 (App. Div., 1st Dep't 1966).

> tal disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.
>
> (2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

The *Freeman* rule is substantially broader than the M'Naghten test; it focuses on a defendant's ability not only to appreciate the wrongfulness of his conduct but also to conform it to the requirements of law, and it recognizes that both capacities involve matters of degree.

Within a short time after the *Freeman* opinion, the question explicitly arose whether the test there adopted should be applied to a case tried before *Freeman* and on appeal when *Freeman* was decided. In *United States* v. *Sheller*, 369 F. 2d 293 (2d Cir. 1966), a panel of this court decided that the *Freeman* rule should be given that "limited retroactivity." The same issue is again before us in this case. Because two members of the panel that originally heard argument of this appeal[3] believed that the decision in *Sheller* was wrong, we convened the court *in banc* to consider the question again.

There has been much discussion of late of the broad question of "prospective limitation" of judicial decisions.[4]

---

[3] The original panel consisted of Chief Judge Lumbard, Judge Moore and Judge Feinberg.

[4] Mishkin, The Supreme Court 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 58 (1965); see Schwartz Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U. Chi. L. Rev. 719 (1966); Schaefer, The Control of "Sunbursts"; Techniques of Prospective Overruling, 22 Record of N.Y.C.B.A. 394 (1967).

However, the issue before us is only whether the *Sheller* court was correct in applying the *Freeman* rule to a case still on direct appeal when *Freeman* was decided. The question is a narrow one with slight impact; we have been informed by the Government of only two cases that might be affected, of which this is one.[5]

The Government argues that "To reverse a conviction because direct appeal was still pending but not on collateral review creates a capricious . . . discrimination."[6] This seems to us to misstate and confuse the issue. We are not faced here with an attempt at collateral review; moreover, we have only the question of the retroactivity of a change in a rule of substantive, but not constitutional, law. Cf. *Sunal* v. *Large*, 332 U.S. 174 (1947). In relevant context, the real issue is whether the *Freeman* rule should be given what Professor Mishkin has called "normal retroactivity" or "normal judicial operation." Mishkin, *supra* note 4, at 77. Moreover, even if only constitutional law decisions are examined, the Supreme Court has made exactly the distinction the Government labels as "capricious"; i.e., it has denied full retroactivity for new constitutional doctrines, while applying them to cases still on appeal. Thus, in *Linkletter* v. *Walker*, 381 U.S. 618, 622 & nn. 4 & 5 (1965), the Court adopted such limited retroactivity for the rule announced in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), that evidence obtained through an unreasonable search and seizure was to be excluded from state criminal proceedings. In *Linkletter*, 381 U.S. at 627, the Court also stated that:

---

[5] The other is *United States* v. *Caballero*, Dkt. No. 30775 (2d Cir., argued May 9, 1968).

[6] Brief for the United States at 7.

> Under our cases it appears (1) that a change in law will be given effect while a case is on direct review . . . .

In *Tehan* v. *United States ex rel. Shott,* 382 U.S. 406, 409 n. 3 (1966), the Court similarly treated the rule announced in *Griffin* v. *California,* 380 U.S. 609 (1965), which forbade adverse comment by prosecutors and judges on the failure of a defendant to testify in a state criminal trial. However, relying on the later-decided opinions in *Johnson* v. *New Jersey,* 384 U.S. 719 (1966), and *Stovall* v. *Denno,* 388 U.S. 293 (1967), the Government counters that the Supreme Court did not realize what it was doing in the earlier decisions discussed above. The Government claims that "if the Court had ever considered the question squarely"[7] in those earlier decisions, it would have ruled the other way. However, a careful consideration of even the cases relied on by the Government and of the underlying considerations leads us to reaffirm *Sheller.*

In *Stovall* v. *Denno, supra,* the Supreme Court considered the retroactivity of the rules announced in *United States* v. *Wade,* 388 U.S. 218 (1967), and *Gilbert* v. *California,* 388 U.S. 263 (1967), which required "the exclusion of identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of his counsel." 388 U.S. at 294. The Court pointed out, *id.* at 296-97, that the *Linkletter, Tehan,* and *Johnson* cases

> "establish the principle that in criminal litigation concerning constitutional claims, 'the Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application'. . . . ." [Citation omitted.] The criteria guiding

---

[7] *Id.* at 12-13 n. *.

> resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.

Applying these criteria in *Stovall*, the Court held that the new rules were prospective only and refused to distinguish between "convictions now final . . . and convictions at various stages of trial and direct review." It regarded "the factors of reliance and burden on the administration of justice as entitled to such overriding significance as to make that distinction unsupportable." *Id.* at 300-01. The analysis in *Johnson* v. *New Jersey*, 384 U.S. 719, 726-33 (1966), also relied on by the Government, was similar.

On the other hand, applying this reasoning to the question in this case leads to a completely opposite result. Extending the *Freeman* rule to cases still on appeal when it was announced will place no significant "burden on the administration of justice." In *Stovall* and *Johnson*, the Court was obviously concerned that great numbers of cases might be reopened even by limited retroactivity.[8] In contrast, we know of only one other case that will be affected by our ruling here. Moreover, no hearings will have to be held on "the excludability of evidence long since destroyed, misplaced or deteriorated," compare *Linkletter* v. *Walker*, 381 U.S. at 637, and witnesses available at the trial two and one-half years ago are presumably still

---

[8] See Schwartz, *supra* note 4, at 764:

> [O]n the same day *Johnson* was decided, the Court denied certiorari in over 120 cases raising issues similar to *Miranda*, many of which were on direct review. [Footnote omitted.]

available. There is no problem here of "a legalized mass jail break by rapists, murderers, and other felons." See *Schwartz, supra* note 4, at 745.

Similarly, no overpowering argument of reliance by "law enforcement authorities" can be made. Putting to one side whether the rejection of M'Naghten elsewhere[9] precluded a justified "reliance" upon it in the absence of controlling precedent in this court, the rules on criminal responsibility—old or new—have nothing to do with police conduct at all. It is true that the United States Attorney's office expended time and effort in indicting and prosecuting Tarrago, as did the trial judge in presiding at the trial. Perhaps it could be said that in doing so both "relied" on prior cases. But that type of reliance is less compelling than reliance "on the old standards" by law enforcement authorities in obtaining evidence by following a course of conduct which suddenly becomes an alleged—and perhaps ineradicable—bar to a conviction. We know of no reason why there cannot be a speedy retrial here at which the Government can produce again the evidence it already has.

Finally, and most important, the purpose of the *Freeman* rule was to deal more humanely and intelligently with the substantive question whether "certain classes of wrongdoers are . . . properly the subjects of criminal punishment," 357 F. 2d at 625. The issue before us on this direct appeal is whether appellant should suffer the penalties of the criminal law, even though we are not sure that he should; the doubt exists because the jury in this case applied "medically discarded concepts" to appellant's conduct rather than the more enlightened test of *Freeman*.

---

[9] See, e.g., *United States* v. *Currens*, 290 F. 2d 751 (3d Cir. 1961); *Durham* v. *United States*, 214 F. 2d 862 (D.C. Cir. 1954).

Such doubt can easily be dispelled if appellant is retried under a test that accords with modern penal and psychiatric thought.

The Government points out that when two other circuit courts changed the definition of insanity, the new rule was made purely prospective, see *Durham* v. *United States*, 214 F. 2d 862, 874 (1954); *United States* v. *Shapiro*, 383 F. 2d 680, 687 (7th Cir. 1967) (*in banc*). However, in neither case was there a discussion of the retroactivity problem in terms of the criteria suggested by the Supreme Court to guide resolution of that issue; i.e., the purpose of the new standard, the extent of reliance on the old standard by law enforcement authorities, and the effect of retroactivity on the administration of justice.[10] Therefore, we have no way of knowing, for example, what would have been the effect in those circuits of the "limited retroactivity" under consideration here. In any event, as we have pointed out above, we see good reasons for applying the *Freeman* test to cases not yet final and no compelling reason for not doing so.

Judgment reversed and case remanded for a new trial.

LUMBARD, *Chief Judge*, with whom MOORE, *Circuit Judge*, concurs (concurring in the result):

I reluctantly concur in the reversal of Tarrago's conviction.

I voted in favor of *en banc* consideration of this case because it seemed to me that it is important in all situa-

---

[10] *Durham*, of course, was decided in 1954, long before the recent Court decisions which emphasized these criteria.

tions where, after submission to all active judges, we announce a new rule for the district courts to apply in determining issues raised in criminal cases that all of the active judges of the court should pass upon the question of the extent to which the new rule is to be applied to cases tried prior to the time the court announces the new rule. Unfortunately we did not give such consideration to the application of the new test for determining criminal responsibility which was announced in *United States* v. *Freeman*, 357 F. 2d 606 (2d Cir. 1966).

In *Freeman*, the court adopted the test of criminal responsibility in §4.01 of the American Law Institute's Model Penal Code. *United States* v. *Malafronte*, 357 F. 2d 629 (2d Cir. 1966), was argued and decided concurrently with *Freeman*. The court held, "because the trial judge, in assessing [the criminal incompetence] defense, applied a standard which we have today declared in *Freeman* to be outmoded and hence insufficient, we reverse and remand for a new trial," 357 F. 2d 629, applying the *Freeman* rule retroactively to a case on direct appeal without explicitly considering whether this new rule should only be applied prospectively. Since both *Freeman* and *Malafronte* were circulated to all of the active judges of the court and neither my brethren nor I objected or desired to give these cases *in banc* consideration, I feel compelled to accept the logical consequences of the remand in *Malafronte*. If the issue of retrospective application of *Freeman* were being posed for the first time in this case, I would at least vote to limit *Freeman* to cases tried after the decision was announced. *United States* v. *Shapiro*, 383 F. 2d 680 (7th Cir. 1967); *Durham* v. *United States*, 214 F. 2d 862, 874 (D.C. Cir. 1954). See *United States* v. *Youngblood*, 379 F. 2d 365, 370 (2d Cir. 1967).

The panel in *United States* v. *Sheller*, 369 F. 2d 293 (2d Cir. 1966) announced explicitly what was implicit in *Mala-*

fronte: that *Freeman* has at least limited retroactive effect. But in neither case was the issue of possible prospective application of the *Freeman* rule fully briefed for consideration by the entire court. There was no argument against retroactivity in *Malafronte* and the government's argument against retroactivity to the panel in *Sheller*, citing *Johnson* v. *New Jersey*, 384 U.S. 719, 731-733, was, as the panel itself said, merely *pro forma*. See 369 F. 2d at 295 n. 3.

I am sure that had our attention been directed to the retroactivity issue in *Freeman* and *Malafronte*, or had the United States Attorney sought *en banc* consideration of it, we might well have decided the matter differently from its decision by a panel of the court in *Sheller*.

As in *Linkletter* v. *Walker*, 381 U.S. 618, 622 and n. 4 (1965) and *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 409 n. 3 (1966), the cases upon which the *Sheller* panel relied, the court had already reversed a conviction on direct appeal before the retroactivity issue was even raised and it was compelled to decide between full retroactivity and limited retroactivity rather than between full retroactivity and prospective application. See Mishkin, The Supreme Court 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 72-73, 76, 100 (1965); Schaefer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N.Y.U. L. Rev. 631, 644-646 (1967).

We have been informed by the United States Attorney that of the four defendants in this circuit, other than Freeman, who might be affected by *Freeman* because they had been tried before *Freeman* was announced on February 28, 1966, but the proceedings on appeal had not yet been concluded, two defendants have already received the benefit of *Freeman* by reversal of their convictions, namely,

Malafronte and Sheller. Even though I believe this action to have been erroneous, I reluctantly conclude that we cannot treat Tarrago and Caballero differently.

But inasmuch as it seems likely, in these times of new concepts of justice and newly discovered constitutional rights, that we may announce new rules or doctrines for application in criminal cases, I take this occasion briefly to set forth the reasons why it seems to me to be of the utmost importance to the orderly, efficient and fair administration of the criminal laws that such new rules should be prospective only and that they should be clearly and emphatically stated to be such at the time that they are announced. Indeed, I would go further and advocate that in situations such as faced us in *Freeman,* it would have accomplished our purpose to announce that the rule would be applied to all cases tried after the date the rule was announced and not even apply it to *Freeman.*

While the authorities were widely divided upon what circumstances justify a court's refusal to apply newly declared principles to previous adjudication, those who have critically examined the decisions are unanimous in finding that making a distinction between cases on direct appeal and those that have gone to final judgment is arbitrary, as it subjects appellants to disposition of their appeals on the basis of fortuities unrelated to the merits of the points they would urge upon the court and seems to penalize the more diligent who have processed their appeals without delay.[1]

---

[1] The history of the *Shott* case is a particularly striking example of what Professor Schwartz has called a "fortuitous and inequitable . . . pattern . . . unacceptable where human liberty is at stake." Schwartz, Retroactivity, Reliability and Due Process: A Reply to Professor Mishkin, 33 U. Chi. L. Rev. 719, 733 n. 68.

Since the *Sheller* decision, the Supreme Court itself has strongly condemned the finality distinction which it had used in *Linkletter* and *Shott*. *De Stefano* v. *Woods*, 36 U.S.L.W. 3479, 3480 and n. 2 (U.S. June 18, 1968); *Stovall* v. *Denno*, 388 U.S. 293, 296-301 (1967). As Judge Schaefer put it, "But when a court is itself changing the law by an overruling decision, its determination of prospectivity or retroactivity should not depend upon the stage in the judicial process that a particular case has reached when the change is made. Too many irrelevant considerations, including the common cold, bear upon the rate of progress of a case through the judicial system." 42 N.Y.U. L. Rev. at 645. Bender, The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio, 110 U. Pa. L. Rev. 650, 678 (1962); Mishkin, 79 Harv. L. Rev. at 66 n. 37, 74; Schwartz, Retroactivity, Reliability and Due Process: A Reply to Professor Mishkin, 33 U. Chi. L. Rev. 719, 731, 733-734, 764 (1966). I do not see how we can justify this arbitrary dividing line between those who are permitted to raise *Freeman* retroactively and those who are not. Cf. *Witherspoon* v. *Illinois*, 36 U.S.L.W. 4504, 4507 n. 22 (U.S. June 4, 1968).

Immediately following the affirmance of his conviction by the Ohio Supreme Court, 173 Ohio St. 542, 184 N.E. 2d 213 (1962), Shott sought Supreme Court review on appeal and certiorari, raising the same issue upon which the Court granted certiorari in *Griffin* v. *California*, 380 U.S. 609 (1965) ten months later. When the Supreme Court declined to hear Shott's case, 373 U.S. 240 (1963), Shott immediately sought federal habeas corpus. On the basis of *Malloy* v. *Hogan*, 378 U.S. 1 (1964), the Court of Appeals granted the writ six months before *Griffin*. *United States ex rel. Shott* v. *Tehan*, 337 F. 2d 990 (6th Cir. 1964). The State of Ohio appealed to the Supreme Court, which granted certiorari after *Griffin* and then reversed on the ground that *Griffin* was not retroactive. 382 U.S. 406 (1966).

I would add another consideration which militates against drawing a distinction based upon whether or not appellant has completed his direct appeal: the court should not give appellants an added incentive to delay prosecution of their appeals by any means and thus postpone final determination of their appeals. It would be ironic if those who desire to protect final judgments from collateral attack make the incentives to postpone finality so great that appellants adopt a strategy that substantially delays operation of the principles of finality they wish to preserve. See, Mishkin, 79 Harv. L. Rev. at 77 n. 71, 80 n. 80; Schwartz, 33 U. Chi. L. Rev. 733, 742-743. I see nothing to be gained by applying an arbitrary cutoff point which rewards delay and penalizes those who promptly perfect their appeals in accordance with the rules of the court. In my view, this is seriously disruptive of the administration of justice and should not be permitted when it may fairly be avoided.

However, to reiterate, there are only five cases in the circuit in which limited retroactivity of the *Freeman* rule requires a new trial and three of those cases have already been reversed and remanded. Fairness dictates that the remaining two appellants be accorded similar treatment.

In the future I would hope that any decision which announces a new rule would not be applied retroactively in other appeals without thorough consideration of all arguments for and against retroactive application. See *Griffin* v. *Illinois,* 351 U.S. 12, 25-26 (1956) (Mr. Justice Frankfurter, concurring); Mishkin, 79 Harv. L. Rev. at 64; Note, Prospective Overruling and Retroactive Application in Federal Courts, 71 Yale L.J. 907, 937 (1962). Cf. *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371, 374 (1940). I would hope that any limitations upon

retroactive effect of future decisions will not make arbitrary distinctions based upon the stage of the appellate process at which the case happens to be at the time of the decision announcing the new rule. I would also hope that any panel of this court which entertains for serious consideration a proposal to change any rule regarding criminal cases generally would ask the parties to brief and argue the question of when the proposed new rule should become effective and the nature and number of cases which would be affected by such proposed new rule. And lastly, all the active judges of the court should be alerted regarding such questions before a panel of the court files and publishes its opinion.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 23 1968
JOHN F. DAVIS, CLERK

No. 173

In the Supreme Court of the United States

OCTOBER TERM, 1968

RICHARD E. GORMAN, PETITIONER

v.

UNITED STATES OF AMERICA

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

No. 173

In the Supreme Court of the United States

OCTOBER TERM, 1968

RICHARD E. GORMAN, PETITIONER

v.

UNITED STATES OF AMERICA

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

After a jury trial, petitioner was convicted of wilfully failing to file individual Federal Income Tax Returns for the years 1959 through 1963 in violation of Section 7203 of the Internal Revenue Code of 1954, and the conviction was affirmed by the Court of Appeals for the Seventh Circuit. 393 F. 2d 209. A petition for a writ of certiorari was filed on June 8, 1968 and the government filed a memorandum in opposition on July 8, 1968. Certiorari was denied on October 14, 1968 (No. 173, this Term).

Because of information received after the denial of certiorari, the Solicitor General submits this further memorandum.

Although the petitioner was never himself the target of electronic surveillance, we have now learned that on one occasion he did participate in a conver-

323-534—68

sation that was overheard during the course of an electronic surveillance directed at someone else. This conversation was totally unrelated to the prosecution of the petitioner.

We propose to make a full disclosure of the overheard conversation to the district court in accordance with the procedure which this Court prescribes in *Alderman* v. *United States,* No. 133, O.T. 1967, pending on the government's motion to modify. Since the petitioner will have an adequate remedy in the district court, we urge that this Court not delay the issuance of its mandate.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968

2

SUPREME COURT, U. S.

FILED
NOV 7 1968
JOHN F. DAVIS, CLERK

No. 173

In the
Supreme Court of the United States
OCTOBER TERM, 1968

RICHARD E. GORMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
53 West Jackson Boulevard
Chicago, Illinois 60604
Attorneys for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 173

RICHARD E. GORMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

Petitioner prays that this Court grant rehearing of its order of October 14, 1968, denying the petition for a writ of certiorari, and that a writ of certiorari issue on the question of:

> Whether, when the Department of Justice has in its possession recordings of a criminal defendant's voice, and others, concerning a criminal defendant's activities obtained through illegal electronic surveillance, the Department may refuse unqualifiedly to disclose the existence and contents of those recordings unless in its discretion, free from judicial control, it determines both that the surveillance is or may be unlawful and that the government has thereby obtained any information which is arguably relevant to the litigation involved.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

This petition has been filed within the time set forth in Rule 58.

The intervening circumstance which warrants rehearing is the Solicitor General's admission to the Court of illegal electronic eavesdropping concerning the petitioner, the disclosure that four "index cards" containing references to electronic surveillance concerning the petitioner are in the possession of the Chicago F.B.I. office; the Department of Justice's insistence that no evidence of electronic surveillance concerning the petitioner has a bearing on his case; and upon its right to refuse disclosure of this electronic surveillance in its discretion, rather than under judicial control.

For the information of the Court, the following is a chronological review of the events pertinent to this petition.

On October 2, 1968, your petitioner directed a demand to the Solicitor General (Appendix A) that a search be made of the Federal Bureau of Investigation files concerning any electronic surveillance of the petitioner as a result of information coming to the petitioner after the petition of certiorari had been filed in this case. On October 24, 1968, ten days after certiorari had been denied, the Solicitor General filed with this Court a Supplemental Memorandum admitting one instance of electronic eavesdropping of the petitioner, stating gratuitously and *ex parte* that the conversation was totally unrelated to the prosecution of the petitioner. On the same date, the petitioner received a telephone communication from the United States Marshal asking that he surrender for

commitment to the custody of the Attorney General. Your petitioner, on the same date, appeared before The Honorable Bernard M. Decker, District Court Judge, and moved for a stay pending a review of the status of his rights in view of the disclosures. At that hearing the United States Attorney stated that he would contact the Department of Justice, secure a copy of the eavesdropping and submit it to the District Court for an *in camera* inspection. The District Court granted a stay until Friday, November 1, 1968.

Your petitioner not knowing what, if anything, would be turned over to him, nor what type or kind of hearing he might receive, and it appearing that the Government was attempting to impose a procedure contrary to this Court's well established findings and directions, *Black* v. *United States,* 385 U.S. 26; *Hoffa* v. *United States,* 387 U.S. 231; *O'Brien* v. *United States,* 386 U.S. 345; *Schipani* v. *United States,* 385 U.S. 372 and *Petition for Rehearing in Alderman No. 133, This Term,* pending now in this Court, caused to be filed in this Court, a pleading entitled Petition for Rehearing and Emergency Motion for Stay of Effectiveness of Order Denying Certiorari.

In this petition, your petitioner also indicated to this Court matters which have recently arisen in the United States District Court for the Northern District of Illinois in two cases, *United States* v. *Fidanzi,* No. 67 CR 561 and *Angelini* v. *Illinois Bell Telephone Company,* No. 68 C 612, in which it was revealed that the Federal Bureau of Investigation maintains what are called "index cards" in the course of electronic surveillances in Chicago, Illinois. It appears that every time a person's name is mentioned in an electronic surveillance whether he is present and speaking or not, or when other persons discuss his activi-

ties, the particular tape, record or log, and the date thereof, is registered on an "index card."

On October 29, 1968, petitioner received a protective order of the District Court together with a three-page document purporting to be a log of the overheard conversation of the petitioner. A copy of the protective Order is attached as Appendix B. Without disclosing the contents of this purported log, your petitioner has attached as Appendix C an affidavit of the pertinent areas that could have a bearing on his case and how the Government might have used it for leads concerning evidence used against him.

On November 1, 1968, your petitioner caused to be served, a Subpoena Duces Tecum to the Special Agent in Charge of the Chicago Office of the Federal Bureau of Investigation (Appendix D) calling for the production of "index cards" relating to electronic or mechanical surveillance of the petitioner. At 2:00 P.M. in the afternoon of the 1st day of November, 1968, your petitioner appeared before the District Court where that Court summarily, without taking evidence or hearing argument, and apparently on the representation of non-materiality by the government ruled the purported log not material to the petitioner's case. Thereupon, the United States Attorney moved for quashal of the Subpoena for the "index cards". The cards, four in number were produced for Court inspection upon request of petitioner, whereupon the Subpoena was ordered quashed and the petitioner was ordered to surrender to the United States Marshal despite a plea to the District Court that a Petition for Stay of Proceedings was pending in this Court. Counsel for petitioner asked the District Court to indicate the number of entries on the 3x5 index cards. The Court refused any hearing on them and would not seal them and make them a part of the record.

On November 2, 1968, Mr. Justice Thurgood Marshall entered an order that the effect of the order denying certiorari in this case be suspended pending disposition of a timely petition for rehearing. Your petitioner is now at large, awaiting further orders and instructions of this Court.

Your petitioner respectfully argues that this policy of self-determination of relevance by the Department of Justice and the failure of the District Court to grant an adversary hearing in which evidence could be produced and the right of cross-examination would be present to explore the use made of the illegally obtained material or the existence of any other conversations that may be shown to have been overheard through unlawful electronic eavesdropping surveillance of the petitioner, or concerning the petitioner, and the relevance of any such conversations to the petitioner's subsequent conviction are contrary and in conflict with the pertinent decisions of this Court.

Counsel for the petitioner are not unfamiliar with the "index cards" produced in the District Court in response to the subpoena. Based on this experience gained in other cases cited *supra* since there are four cards and it is believed there are ten lines on each card, it is estimated that there could be thirty-one entries present relating to electronic surveillance of the petitioner. In making the disclosure of the one instance of illegal electronic eavesdropping, the Department of Justice also chooses not to state whether it is the one which was alluded to by the government's attorney in the Seventh Circuit Court of Appeals (Appendix A) which initiated the petitioner's inquiry to the Solicitor General, or some other eavesdropping. Thus, again, we find the Department of Justice

making grudging piecemeal admissions of the presence of electronic surveillance causing unending litigation to ferret out this illegal evidence-gathering. When the issue is electronic surveillance, and a criminal prosecution, the defendant's need to protect himself and be accorded a full ventilation makes his claim of disclosure upon government files stronger than in any other litigating posture. *Dennis* v. *United States,* 384 U.S. at 872, Note 20.

Petitioner submits that this case presents an urgent need for the exercise of the Court's supervisory power over federal criminal justice including an order setting out the conditions under which electronic surveillance should be disclosed under judicial supervision, and granting the petitioner an opportunity to insure, through adversary litigation that his prosecution was free of all taint from illegal surveillance. Certainly the production of the "index cards" signifies that the interdepartmental intelligence is not always available to all persons making representations to this Court in behalf of the government, this then only magnifies the problem of the defendant who by virtue of a chance discovery of illegal surveillance has the task of seeking a full discovery thrust upon him.

CONCLUSION

For the foregoing reasons, petitioner prays that a rehearing be granted, and that upon the rehearing, a writ of certiorari issue, the judgment be reversed, and the cause remanded for further proceedings.

Respectfully submitted,

ANNA R. LAVIN
EDWARD J. CALIHAN
Attorneys for Petitioner

CERTIFICATE

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that it is restricted to the grounds specified in Rule 58(2) of the Rules of this Court.

.....
ANNA R. LAVIN

.....
EDWARD J. CALIHAN
Counsel for the Petitioner

Subscribed and Sworn to
before me this 6th day
of November, 1968.

.....
Notary Public

APPENDIX A

October 2, 1968

Hon. Erwin N. Griswold
Solicitor General
Department of Justice
Washington, D.C. 20530

Re: Richard E. Gorman, Petitioner,
v. United States, No. 173,
October Term, 1968.

Dear Sir:

Your attention is directed to the following facts:

The Petitioner, Richard E. Gorman, is an attorney. He represented S. George Burris, a defendant in case No. 63 CR 311 entitled United States of America v. James R. Hoffa, et al., in the District Court for the Northern District of Illinois. The defendants were convicted and appealed. On Petition for Certiorari, the Solicitor admitted eavesdropping by way of wiretapping had occurred concerning the defendant Mr. Gorman represented. A hearing was ordered by the Supreme Court to determine the extent of the eavesdropping. During that hearing, the District Court refused to allow the defendants to develop if any eavesdropping involved any of the lawyers for the defendants.

On appeal from this hearing in case No. 16634, Seventh Circuit Court of Appeals, the attorney who represented the Government disclosed, on oral argument in June of 1968, for the first time in any court proceeding, that eavesdropping of certain defense attorneys had occurred. The attorney handed to the court a sealed folder which contained the Federal Bureau of Investigation logs of the conversations. Demand was made and refused that these logs be turned over to the defendants. The Court of

Appeals, in its opinion on August 15, 1968, held the information irrelevant to the Hoffa case.

The Petitioner requests that the Solicitor direct the Federal Bureau of Investigation conduct a search of its files and turn over to the Petitioner all records of conversations either by him or pertaining to him for the purpose of his determining if any of these violations of his constitutional rights tainted the evidence in his case, now pending on Petition for Certiorari before the Supreme Court.

Respectfully,

ANNA R. LAVIN

ARL:pw

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA
-vs-
RICHARD E. GORMAN
No. 66 CR 133

ORDER

This cause coming on to be heard upon the motion of the defendant, Richard E. Gorman, the Court having heard counsel for the defendant and counsel for the government and being fully advised of the premises,

IT IS HEREBY ORDERED that the government provide the defendant and his counsel with a copy of the electronic eavesdropping material which has been disclosed by the Solicitor General of the United States;

IT IS FURTHER ORDERED that neither the defendant, Richard E. Gorman, nor his counsel, Anna Lavin and Edward Calihan, is to disclose in any manner the contents, nature or substance of such electronic eavesdropping material to anyone without obtaining prior permission of the court.

ENTER:

.....
UNITED STATES DISTRICT
COURT JUDGE

DATED at Chicago, Illinois,
this ..... day of October, 1968.
RGS:ek

APPENDIX C

NO. 173

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

RICHARD E. GORMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S AFFIDAVIT IN SUPPORT OF PETITION FOR REHEARING

RICHARD E. GORMAN, being on oath first duly sworn, deposes and says:

1. My name is RICHARD E. GORMAN, and I am the Petitioner herein.

2. I have read the purported log submitted by the Government to the District Court and furnished to my attorneys and myself under a protective court order.

3. I am reasonably sure that I know the location of the electronic surveillance.

4. I know that the time period was during the years alleged in the indictment against me.

5. That during that time I visited the location on many occasions.

6. That during that time I was an attorney representing many clients in federal criminal prosecutions.

7. That during that time I conferred with clients at that location.

8. That the subject matter of the discussion referred to in the log may be material to my tax case.

Further, Affiant Sayeth Not.

/s/ Richard E. Gorman
RICHARD E. GORMAN

SUBSCRIBED and SWORN to before me this 5th day of November, 1968.

/s/ Janice S. Tipp
JANICE S. TIPP,
NOTARY PUBLIC
MY COMMISSION EXPIRES:
May 13, 1972

SEAL

APPENDIX D

Subpoena Duces Tecum — Case No. 66 CR 133

United States District Court
Northern District of Illinois

The President of the United States of America

To Marlin Johnson
Special Agent in Charge
Federal Bureau of Investigation
219 South Dearborn;
Chicago, Illinois 60604

OR Any Other
Authorized Agent
or Custodian
of Records
—*GREETING:*

WE COMMAND YOU, that all business and excuses being laid aside, you and each of you attend before Honorable Bernard M. Decker one of the Judges of the United States District Court for said District, on the 1st day of November, A.D. 1968, at 2:00 o'clock in the P.M. in Room 2141 United States Court House in Chicago, in said District, to testify and give evidence in a certain cause now pending and undetermined in said Court, wherein United States is plaintiff and Richard E. Gorman Defendant, on the part of said Defendant, Richard E. Gorman And that you also diligently and carefully search for, examine, and inquire after and bring with you, and produce at the time and place aforesaid, The index card relating to electronic or mechanical surveillance respecting or relating to Richard E. Gorman.

together with all copies, drafts, and vouchers relating to the said documents, and all other documents, letters, and paper writings whatsoever, that can or may afford any information or evidence in said cause. And this you shall

in nowise omit, under the penalty of the law in that case made and provided.

To the Marshal of the Northern District of Illinois to execute and return in due form of law.

ELBERT A. WAGNER, JR.
Clerk

[SEAL]

By /s/ John M. Knox
Deputy Clerk

DATED: Nov. 1, 1968

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

JANICE S. TIPP, being on oath first duly sworn, deposes and says:

That she did personally serve the within subpoena, by delivering a copy of same to Kyle Clark, Assistant Special Agent in Charge, at the office of the Federal Bureau of Investigation, 9th Floor, 219 South Dearborn Street, Chicago, Illinois, 60604, at 10:25 A.M., on November 1, 1968.

/s/ Janice S. Tipp
JANICE S. TIPP

SUBSCRIBED and SWORN to
before me this 1st day
of November, 1968.
/s/ Evelyn M. Rutkowski
NOTARY PUBLIC

(Seal)

SUPREME COURT, U. S.

FILED

APR 23 1969

JOHN F. DAVIS, CLERK

No. 173

In the Supreme Court of the United States

OCTOBER TERM, 1968

RICHARD E. GORMAN, PETITIONER

v.

UNITED STATES OF AMERICA

MEMORANDUM IN RESPONSE TO PETITION FOR REHEARING

ERWIN N. GRISWOLD,
Solicitor General,

JOHNNIE M. WALTERS,
Assistant Attorney General,

JOSEPH M. HOWARD,
JOHN M. BRANT,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 173

RICHARD E. GORMAN, PETITIONER

v.

UNITED STATES OF AMERICA

MEMORANDUM IN RESPONSE TO PETITION FOR REHEARING

This memorandum is submitted in response to the order of this Court dated March 24, 1969 requesting an answer to the petition for rehearing.

The petition for certiorari was denied on October 14, 1968. On October 23, 1968, we advised the Court that we had discovered that petitioner had been overheard during the course of an electronic surveillance. We stated that petitioner himself had never been the target of such a surveillance; that on one occasion he had participated in a conversation picked up during a surveillance directed at someone else; that the conversation was totally unrelated to the prosecution of petitioner; and that we proposed to make a full disclosure of the overheard conversation to the district court. Disclosure of the log of this conversation was

then made to petitioner in the district court at hearings conducted by the trial judge on October 24, October 29, and November 1, 1968.[1]

This Court has requested a specific response to the allegation of the petition for rehearing (p. 4) to the effect that petitioner

> appeared before the District Court where that Court summarily, without taking evidence or hearing argument, and apparently on the representation of non-materiality by the government ruled the purported log not material to the petitioner's case.

Petitioner's statement does not accurately reflect what occurred in the district court. The government informed the district court that there was only one log which recorded a conversation to which petitioner had been a party (Tr. 3, 25).[2] A copy of that log was turned over to petitioner's counsel in open court on October 29, 1968 (Tr. 11-14). And, at the hearing on November 1, 1968, counsel conceded that the log contained nothing relevant to the offenses involved in this case[3] (Tr. 25).

---

[1] The transcript of these three hearings has been lodged with the Clerk of this Court and will be referred to as "Tr.".

[2] Our investigation has indicated that petitioner himself was never the target of an electronic surveillance; that no such surveillance was ever conducted on petitioner's premises; and that the two attorneys who represented him at the trial have not been the subjects of electronic surveillances, nor have any of their conversations been monitored by an electronic device, nor have they been mentioned or discussed by others whose conversations were being monitored.

[3] The district court had already come to the same conclusion (Tr. 9, 12).

The district court was informed that the government had logs of additional conversations in which petitioner was mentioned although he was not a party to the conversation (Tr. 25). Petitioner's counsel did not ask for copies of these logs, but he did ask for production of F.B.I. index cards relative to the surveillance in which petitioner had been overheard (Tr. 23-24). The government objected on the ground that petitioner had already been given the log of the only conversation to which he had been a party, and the court refused to order further production (Tr. 23-25).

Petitioner had no standing to complain of electronic surveillances which were not conducted on his premises and which did not record conversations to which he was a party. *Alderman* v. *United States*, No. 133, Oct. Term 1967, decided March 10, 1969. Having received the log of the only conversation which he had standing to suppress and having conceded that the conversation was not relevant to the prosecution, petitioner had no right to explore the files of the Department of Justice in order to question the veracity of representations by the government. *Taglianetti* v. *United States*, No. 446, this Term, decided March 24, 1969.

The petition for a rehearing should be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General,

JOHNNIE M. WALTERS,
Assistant Attorney General,

JOSEPH M. HOWARD,
JOHN M. BRANT,
Attorneys.

APRIL, 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 347356 633

UPREME COURT. U. S.

APR 30 1969

JOHN F. DAVIS, CLERK

No. 173

In the

Supreme Court of the United States

OCTOBER TERM, 1968

RICHARD E. GORMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Rehearing From the Denial of the Petition for a Writ of Certiorari.

REPLY MEMORANDUM TO MEMORANDUM OF THE UNITED STATES IN OPPOSITION

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
53 West Jackson Boulevard
Chicago, Illinois 60604
Attorneys for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 173

RICHARD E. GORMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Rehearing From the Denial of the Petition for a Writ of Certiorari.

MOTION FOR LEAVE TO FILE REPLY MEMORANDUM

Petitioner, through his counsel, moves this Court for leave to file the attached memorandum in reply to the "Memorandum in Response to Petition for Rehearing". The grounds for this motion are that the government's memorandum introduces questions of fact and law to which reply is appropriate. It is believed that this reply will aid the Court in its determination of the petition for rehearing.

Respectfully submitted,

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
53 West Jackson Boulevard
Chicago, Illinois 60604
Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 173

RICHARD E. GORMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY MEMORANDUM

The government's memorandum filed at the request of the Court asserts propositions both of law and fact which have been repeatedly rejected by this Court in other cases wherein the matter of illegal electronic eavesdropping has become an issue. It is interesting to note that in the government's original supplemental memorandum of disclosure filed with this Court after the denial of certiorari, the government stated that it was their intention to make a full disclosure of the overheard conversations to the District Court in accordance with the procedure which this court would prescribe in *Alderman* v. *United States,* No. 133, O.T. 1967. To maintain as it now does that the

purported hearings in the District Court were in accordance with the opinion of this court rendered in that matter on March 10, 1969 is a rather startling development.

In both appearances in the District Court the record which has been filed with the Clerk of this Court shows that the petitioner, rather than demanding immediate hearing, was at pains to persuade the District Court to await development in this Court on the related matters and on what had been filed in his own behalf with this Court as a result of the disclosure made by the Government.

Even in the colloquy between the Court and petitioner's counsel, wherein it was "conceded" that the content of the log was not material to the charges of wilful failure to file tax returns, it is apparent that no evidence was to be taken nor contentions as to arguable relevancy to be heard. Thus, was precluded the minimal to which this court said the petitioner was entitled.

> "Armed with the specified records of overheard conversations and with the right to cross-examine the appropriate officials in regard to the connection between those records and the case made against him, a petitioner may need or be entitled to nothing else." *37 L.W. 4195.*

This court was made aware in the *Alderman* case that the interdepartmental examination extends only to the overheard conversations themselves, and not to investigative reports reflecting leads or evidence obtained as fruits of the illegality. In *Black,* it became apparent that the logs of the recorded conversations were innocuous, but the secondary materials deriving from the logs revealed government concern with Black's tax case. In

Alderman it was argued to this Court that agent Pennypacker disclosed the purpose of surveillance is intelligence-gathering primarily used as a means of obtaining leads for investigation of the target subject through compiling information of his activities and the activities of every person with whom he comes in contact.

In his affidavit appended to the Petition for Rehearing filed by this petitioner, he states he can identify with reasonable certainty the location of the electronic surveillance and states that he frequented that location. He should have been allowed to inquire into the duration of the surveillance, and the portent of the intelligence gleaned from it, if any there was.

The government further assures that "no such surveillance was ever conducted on petitioner's premises". It admits that it has logs of additional conversations "in which petitioner was mentioned," but does not remind the court that the entries of such conversations were on four index cards. Although the trial judge refused to indicate the number of entries, the ordinary index card has ten lines, so it can be estimated that something in excess of 31 entries occurred. Assuming, and we do, that petitioner himself was not overheard, may not inquiry be made into whether or not the physical surveillance showed him to be present, though silent?

Further, the assurance that the surveillance was never conducted on his premises is reminiscent of the like assurances made in regard to *Alderisio*.

> "In its brief on reargument, the Government suggests that no electronic surveillance was conducted at places owned by Alderisio, but rather was carried out only at premises owned by his associates or by firms which employed him. The Government also contends

> that Alderisio himself did not have desk space at the subject premises. Finally, the Government asserts that Alderman neither participated in any conversation overheard nor had any interest in the places which were the object of the surveillance. These allegations by the Government will have to be considered by the District Court in the first instance, and we express no opinion now on their merit." *37 L.W. 4190, fn. 1.*

While we accept the representation of the Solicitor General that *their* investigation developed only one instance in which petitioner was actually overheard, inquiry should be made into the extent of that investigation and what it constituted.

The efficacy of the government's investigation into its own files has fallen far short of perfect in many recent cases, e.g. *Black* v. *United States,* 385 U.S. 26, wherein after the original miniscule disclosure adversary proceedings disclosed numerous additional overhearings which led to a new trial being ordered. Also in *Hoffa* v. *United States,* No. 895, This Term, after an assertion by the government of only one illegal electronic eavesdropping incident, adversary proceedings disclosed numerous other instances which required this Court for the second time to order that matter back to the District Court for additional fact-finding hearings.

To state that petitioner's counsel did not ask for copies of additional logs in the purported hearing is to demonstrate that because of what took place, the petitioner was not able to conduct an orderly pursuit of discovery and because of the Court's quashing of the subpoena relative to the F.B.I. index cards, no orderly discovery and adversary proceedings were available.

Your petitioner is not seeking to rummage through files of the Department of Justice in order to question the veracity of the representations by the government, even though these have in the past fallen far short of being completely informed. It has been demonstrated that the control of inter-departmental proceedings by offending agencies raises serious problems. The agents are not subjected to cross examination; the scope of the inquiry can never be as broad as when opposing counsel are present to press for additional facts and documents. This Court now has established a procedure for the conduct of these hearings and their scope, and your petitioner seeks no more nor any less than that which has been accorded other petitioners in similar circumstances.

CONCLUSION

The Government's Memorandum demonstrates again the need for this Court to guide the circumstances under which electronic surveillence should be disclosed. For these reasons, your petitioner prays that a rehearing be granted and that upon the rehearing a Writ of Certiorari issue, the judgment be reversed, and the cause remanded for further proceedings.

Respectfully submitted,

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
Attorneys for Petitioner